CHAIRPERSON JAMES: We have a very substantive panel in front of us and I'd like to open it up at this point for questions. I'm going to go first to Mr. McCarthy, then over to Mr. Wilhelm and then from there. Commissioner McCarthy.

COMMISSIONER McCARTHY: Mr. Anderson, just let me toss the softball first. You mentioned a series of conditions that existed in many Indian tribes all of which I believe are accurate; alcoholism, death rate, homicide, gangs, prior to the arrival of gambling for many tribes. What you didn't give us was the after, how all those statistics and conditions changed and I don't want you to do that here, but I'd like you to do it in a follow-up to tell us and specifically tell us, you know, substantiate the reasons why what I took as an inference that gambling was the significant cause in changing those conditions if you would.

Now, two members of this panel have raised the central issue that we kept hearing about in California yesterday and I'll start with Mr. Anderson here. I'm troubled by what good faith by the state means and I'm not sure I understood when you said that the Department of Interior should appoint a mediator if the tribe and the state don't agree for lack of good faith. So I'm going to give you a couple of examples and you can answer.

The State of Utah doesn't have any form of gambling. If a tribe in Utah wants to introduce Class II or Class III gambling and the leadership of the State of Utah says, "I'm sorry, but in this state we have a tradition of no gambling in any form", is the leadership of the State of Utah in bad faith if they don't permit whichever tribe in Utah it is that wants to
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initiate Class II or Class III gambling under your -- under the
Department of Interior's interpretation of the federal law?

MR. ANDERSON: In that circumstance the state would
not be in bad faith but as Mr. Gede described the Rumsey case
which is the law of the Ninth Circuit but the Department has
basically treated it as its position as well nationally, has said
that state -- where is state has reasonably characterized the
relevant state laws as completely prohibiting a distinct form of
gaming they don't have to negotiate for those particular tribes.

COMMISSIONER MCCARTHY: Now let me shift to
California and I'm sure there may be some members of this panel
that are close friends of the governors. I'm not sure I'm on
that list so I don't ask this question out of some partisan
feeling in any form. We have 100 recognized tribes in
California. A number of them have gaming. A number of them, of
course, feel very strongly that they should have the right to
Class III gambling forms which are otherwise prohibited in the
State of California.

Is it the Department of Interior's position that the
State of California is in bad faith if it says, "I'm sorry, it is
our policy not to allow these forms of Class III gambling for
anyone in our state. Therefore, we're going to be consistent and
now allow that for certain tribes that want Las Vegas type open
casino gambling, roulette, you know, whatever in all of its
forms. Is that State of California acting in bad faith?

MR. ANDERSON: As to the question -- and I think that
really was the issue in the Rumsey case, where the Department's
position, the governors' position is where the state law at issue
here absolutely prohibit bank down percentage card game and non-
lottery slot machines, California could reasonably treat those as
distinctive forms of gaming for purposes of framing its criminal
prohibitions in that type of instance where they've completely
outlawed that particular form of gaming the state is not under a
duty to bargain.

Now, one side note to that; the relevant question in
such a case where there may be different facts is in light of the
traditional understandings, the text and legislative history of
IGRA, the state has reasonably characterized the relevant state
laws as completely prohibiting a distinct form of gaming. If the
state has not reasonably so characterized its laws, it would have
a duty to negotiate with respect to the gaming. This is where a
state -- the question is really whether it completely prohibits
distinct forms of gaming or whether it's merely regulating
certain forms of gaming. That's where courts begin to interpret
what's regulating a form of gaming or actually prohibiting.

But in the case of Rumsey where it was non-lottery
slot machines, the state was not under a duty to bargain.

COMMISSIONER McCARTHY: Has the Department of
Interior ever issued any kind of an opinion regarding the
situation in California?

MR. ANDERSON: The -- it's not issued any solicitor's
opinion. What it has done is in its advanced notice of proposed
rulemaking on its rule, basically adopted the Rumsey case which
is in the Ninth Circuit and is a California case as its rule
nationally. So to the extent that we've adopted a view that if a
state completely prohibits gaming that is contained in our proposed rulemaking notice.

Now, I think the questions you pose are not the hard ones. The hard ones are these and I wanted to respond in part to Mr. Gede's statements about good faith. Mr. Gede is a very well-respected advocate for the State of California's views. The courts in some cases, notably Seminole, have accepted those views but the harder question comes when the Department is confronted with this situation and I'll change the facts a little bit but these are real live situations that have occurred.

A tribe and a state may have a compact and the regulatory fee structure between the state and the tribe may be 100,000, 200,000 per year. The state has the option of renewing that compact or not renewing. The week before or maybe even the day before the compact is to be renewed, the state will say, "We don't believe $500,000.00 is sufficient. What we would like is a share of all of the revenues of each slot machine, maybe 5, $10 million. Moreover, we would like to agree to state regulation of hunting rights. We would like you to not exercise your rights to off-reservation fishing. We would like a labor union in your organization as well. We would like to apply state regulatory oversight and regulate the hours. Sign all this today, or else we won't renew".

The question is, is that good faith or bad faith? Mr. Gede has said that in his remarks that states have exercised good faith. I don't have a doubt that certain federal judges in that circumstance would say that the state has acted in bad faith in that type of circumstance. So the first one is a softball but...
the second ones were softballs as well because those aren't very 
close questions. What we encounter is things --

COMMISSIONER McCARTHY: You said those are not very 
close questions.

MR. ANDERSON: Those are not very close questions.

Those have been answered by the Rumsey case. Where a state does 
not put its demands on paper, where there are meetings where 
there is no record but an implied threat that there will not be 
renewal unless these are agreed to, that's really the situation 
that we've encountered.

COMMISSIONER McCARTHY: Now the compact between the 
State of California and the Pala Tribe includes requirements of 
Workman's Compensation.

MR. ANDERSON: Yes.

COMMISSIONER McCARTHY: Still a softball?

MR. ANDERSON: Still a softball because in that case 
the tribe and the state voluntarily agreed and there was no 
indication from the tribe, the Pala Band, that there was coercion 
or undue influence or tactics by the state.

COMMISSIONER McCARTHY: All right, now there are 
negotiations going on with we're not sure, whatever we heard, 
seven or eight other tribes that may enter into a comparable 
compact but beyond that there are many other California tribes 
that don't like those conditions and perhaps, we're not sure yet, 
this is playing out, maybe they don't like the requirement of 
Workman's Compensation. Softball?

MR. ANDERSON: A more difficult question because --
COMMISSIONER McCARTHY: They want to fight it. They want a mediator from the Federal Government.

MR. ANDERSON: Well, in that particular case the state has assured us that they are treating each compact separately and differently, that this is a bargaining process. If the state was to insist that this is a flat out model compact that cannot be changed, it certainly would raise questions about the bonafides of the state in those negotiations.

COMMISSIONER McCARTHY: Well, I didn't take part in the negotiations but let us assume that it's the state's position that protection of employees of certain basic living standards, Workman's Compensation in case of a downturn in the economy and unemployment arises, certain minimal health requirements if they're non-existent and I'm not assuming they're non-existent. I think they are existent on almost all if not all tribes that have gambling operations now. I'm already convinced that they're being financially supported.

But the state policy says, "Hey, this is for five generations in this state. We went through this struggle a long time ago about how we want to treat people who work in this state and this is basic -- for the human condition this is basic to us. This is in our minds, in our hearts we feel passionately that working people should have these conditions". Operating in good faith?

MR. ANDERSON: The key fact you mentioned is, is there something sufficient in place or does the tribe have a plan to begin that sufficiency and put it in place. If they do, if the tribe as a government can take care of those issues as its
own -- under its own laws, I think it raises a very close
question as to whether the state and where the tribe refuses to
accept those negotiations or conditions, whether the state has,
in fact, acted in bad faith given a viable alternative of the
tribal regulation scheme.

It's difficult without -- answering these in the
abstract. I think it raises a much closer question, particularly
if the tribe has in place or could put in place a viable
protection scheme for its workers.

COMMISSIONER McCARTHY: I'm assuming that a number of
tribes want to do this on their own, so I'm not assuming
otherwise. On the other hand, I'm not sure that's true of all
just as it was certainly not true of a lot of employers in
California before this basic law and value system was created
many years ago. Now, there are, I don't know, at least 20 gaming
tribes right now and there could be many more. Would we have 20
or 30 or 40 different kinds of Workman's Compensation programs?
Who would look after those to make sure that that deeply rooted
philosophy of how we want working people to be treated would be
adhered to?

MR. ANDERSON: Well, I think that you find that
different among the states and how they treat their Worker's
Compensation --

COMMISSIONER McCARTHY: Oh, indeed.

MR. ANDERSON: -- and 401K plans differ between
tribes.

COMMISSIONER McCARTHY: Yes, but we're the State of
California and we have certain rights under the U.S. Constitution
as do other states and we are attempting to stay consistent, to
stay faithful with how we passionately believe working people
should be treated.

MR. ANDERSON: I would say you don't have an
unfettered right on Indian lands to insist on in every aspect
your philosophy. It is a government to government relation
through negotiations.

COMMISSIONER McCARTHY: Yeah, I'm talking about one
that's deeply rooted and is based in a value system. What you
suggested about waiting till the day before a compact has to be
renewed and saying, "Hey, hey, 100,000 isn't good enough any
more, we want a million". We understand that maybe that's a
little bit of unfairness in the negotiating process there without
knowing -- you know, we've all read the stories about certain
states and how they negotiated for a piece of the revenue or so
on. That gets into a more questionable marginal area.

Here I'm talking about something else. Well, you get
the point of what I said. I'll pass this onto someone else.

MR. ANDERSON: Mr. McCarthy, if I might just for one
moment, I did want to share just for maybe a minute. You were
talking about the effects and we will provide that in writing. I
do just have a few facts I wanted to share with you from
different tribes. These are basically circa 1996 but I think
they're still valid.

The Hochunk (ph) Nation of Wisconsin funds 90 percent
of its housing budget from gaming revenues. The Mille Lacs Band
and the Fondilake Band, Chippewas in Minnesota use gaming
proceeds to construct health clinics for their members. The
Mille Lacs Band also built the first Indian school fully funded by gaming revenues including both primary and secondary schools at a cost of $6 million. The most recent BIA data available from '96 which covers only the beginning of Indian gaming shows that between 1991 and 1993 employment of Indians in Michigan, Minnesota, North Dakota, South Dakota and Wisconsin increased by 4500 jobs. Unemployment decreased by 880 Indian persons. The unemployment rate decreased by seven and a half percent.

As a result of the casino the White Earth Band of the Chippewa's unemployment in Monamine County, Minnesota was the lowest in the five-county region. From 1990 to 1994 the unemployment rate dropped from over 11 percent to about four percent. And then finally in August '94 Michigan Indian gaming enterprises employed 4500 people, 64 percent of whom were from the surrounding communities.

Just a few facts antidotaly of tribes where there's been a clear beneficial impact since gaming. What we will try to do is provide the staff as much study information as we have but a valuable service of this Commission would be to have some objective data presented that would describe the impacts but in our view clearly beneficial in many, many cases.

CHAIRPERSON JAMES: Mr. Anderson, can I just ask you a quick point of clarification? Could you just talk briefly about the role of the Federal Government in terms of arbitration between states and tribes when you believe it to be not in good faith and is that -- just clarify that.

MR. ANDERSON: Right. What our proposed rule does is lay out a process. That is -- I will quibble slightly with Mr.
Scheppach's statement that there's no role for the state and it's solely a federal/tribal process. At each stage of a process where tribes and states can't agree with the state on a particular form of gaming or a scope of gaming, the Secretary's rule would allow and permit active dialogue, discussion, written objections from the state, presentations from the state on what their public policy might be as to distinct form of gaming.

CHAIRPERSON JAMES: I guess the specific question I have is at what -- how does that get triggered? Does the Federal Government determine that they need to arbitrate this or does either party?

MR. ANDERSON: What would happen is we've asked for comments on this. When there's a disagreement between a state and a tribe, a federal mediator would be appointed to help resolve and make recommendations to the Secretary.

CHAIRPERSON JAMES: So the decision would be that of the Federal Government that they would intercede or intervene in that situation?

MR. ANDERSON: Yes, ultimately the federal mediator would make a recommendation on the last, best offers of the state and tribe and the Secretary would ultimately decide under a standard review that would allow federal court challenge if the Secretary is wrong.

CHAIRPERSON JAMES: So a federal Secretary of the Interior would make the decision that they would arbitrate a dispute between a governor and a tribal leader.

MR. ANDERSON: Yes, with -- after full participation and the process ultimately the administrative official, because
of our unique relationship and authorities on federal lands, the Secretary of Interior would make that decision with appeal then to federal courts to determine whether the Secretary made the right decision.

CHAIRPERSON JAMES: And the decision about whether or not to initiate this process does not belong to either of the two parties that would be involved in the arbitration but would be at the discretion of the Secretary of the Interior.

MR. ANDERSON: Correct, with standards on, as we've laid out in -- I mean, basically as in the colloquy with Mr. McCarthy, I've talked about our view about what's the scope here. It's not the scope that the Secretary could in any case say any type of Class III gaming is acceptable. It would be looking at whether the state relate a particular form of Class III gaming and whether that is subject to his compact with the tribe.

CHAIRPERSON JAMES: Okay, and finally just for clarification, where are we in the regulatory process with this right now? Is it out for public comment?

MR. ANDERSON: The comment period closed June 22nd and we had an enormous amount of comments from states, governors, tribes and others and so I think the views are fairly well understood. What is happening at the Department now is a review of all of those comments to determine what new information has been received. That process is ongoing. Currently Congress, through what's called the Enzie/Reid amendment to our appropriations bill for this year has deauthorized the ability of the Secretary to actually implement regs this year. That prohibition expires October 1st of this year. At that time the
Department would be free to publish its regulations and then to begin negotiations, but I expect that will be the subject of numerous legal challenges as well.

CHAIRPERSON JAMES: Mr. Scheppach, can you tell us what the position of the National Association of Governors is on this particular recommendation?

MR. SCHEPPAH: Yeah, we've written, we're totally opposed to that.

CHAIRPERSON JAMES: Go figure.

MR. SCHEPPAH: Pardon me? Surprise! We just -- we thing it's unconstitutional. We don't think that there's any law that gives the Secretary that right. Plus, I think we question the objectivity of the Secretary given his trust obligations. There's also some hope that the -- that we could, in fact, extend the appropriations restriction on that for another year.

I mean, that's -- we're willing to come to the table in November and talk about some of these issues and, in fact, I'm leaving from this meeting to go to Milwaukee where our annual meeting of governors is to discuss this bypass provision.

CHAIRPERSON JAMES: With the permission of Commissioner Wilhelm, I will go to Commissioner Bible and then back to Commissioner Wilhelm.

COMMISSIONER BIBLE: To follow up on this particular line of questioning, Mr. Anderson, what would be your reaction if this Commission took a policy position in terms of these regulations and perhaps requested that they not be implemented until after the work of Doctor Moore's subcommittee and the work of this Commission was completed?
MR. ANDERSON: I think the views of any viable entity like this Commission are important. The National Governors' Association has put in views, the National Indian Gaming Association. The comment period has closed so I'm not sure what the regulatory effect of that would be but I think views from Congress and others and Commissions are always helpful.

CHAIRPERSON JAMES: Commissioner Wilhelm?

COMMISSIONER WILHELM: This is a great panel. I have a number of comments and questions and the Chair should just shut me up whenever it's appropriate.

CHAIRPERSON JAMES: All right, can we have — no.

(Laughter)

COMMISSIONER WILHELM: I figured if I gave you that one, you'd take it.

COMMISSIONER MOORE: May I suggest that we maybe extend, if necessary, into our break period.

CHAIRPERSON JAMES: I will certainly take that under consideration. What I would suggest is, I know how difficult it is at least for some of us to sit through these long extended periods without a break, so I would ask the audience's patience if you see Commissioners come and go for small breaks while we continue. Thank you.

COMMISSIONER WILHELM: I can't resist beginning by making the slightly sardonic comment that having been a union negotiator for nearly 29 years, welcome to the world of good faith.

(Laughter)
COMMISSIONER WILHELM: So far as I know -- that's a serious comment because so far as I know, there are only two legal schemes in the United States that rest upon the doctrine of mutual good faith between negotiating parties. One which has existed since 1935 is the National Labor Relations Act, which has the precise obligation that you all are expressing frustration with and the other one is this one, which of course, existed a shorter time.

And certainly employers and unions often express some of the same frustrations that you all have with the concept. On the other hand, the basic theory is not a bad one, at least philosophically. The basic theory is that the good faith notion forces the parties to figure out how to get along. And the moment you decide absent the agreement of those same parties, if those same parties agree to go to an arbitrator or something, that works because they both agreed to it, but the moment you decide to layer upon the good faith negotiating concept the idea that somebody else absent the agreement of both parties is going to be the binding arbitrator, then I think what you do is you eliminate as practical matter as well as a philosophical matter, you eliminate the likelihood that anybody is going to negotiate in good faith.

And in particular you eliminate the likelihood that both parties at the same time are going to negotiate in good faith because the likelihood is that at least one of those two parties is going to think they're going to have a better shot with this involuntarily imposed arbitrator, in the case of your proposed rules, the Secretary of the interior. So while I
understand as well as anybody in this room the frustrations of
the good faith negotiating concept and model, I would suggest to
you that to do what the Department proposes to do with it, will
throw out the baby with the bath water.

There will never be or rarely be good faith
negotiations between any state and any tribe if there's another
window that one party or the other can go to without the
agreement of both parties to go to that window. So I think your
regulations go someplace that everybody will feel bad about
having gone once we get there.

I'd like to return to the point that Commissioner
McCarthy was pursuing and I'd like to talk specifically about the
rights of workers in tribal gaming facilities to organize a union
if they choose to do so. As you are aware, there is a mechanism
for that in the Pala compact. It is the policy of the United
States of America that workers shall have the right to organize
and bargain collectively. It is the policy of the State of
California that workers shall have the right to organize and
bargain collectively.

It is the position of the national labor movement
that workers everywhere in the world, workers in Mexico for
example, workers in China, workers in Indonesia, that workers
ought to have the right to organize no matter where they are and
no matter for whom they work. And in fact, it's the position of
the government of the United States in its participation in
national labor organizations and numerous treaties, in numerous
pronouncements by the government and by the Congress that
workers, in general, ought to have the right to organize.
So, until the Pala compact to the best of my knowledge, although some tribal governments, for example, the Navajo Nation, had promulgated on their own opportunities for tribal employees to organize and bargain collectively. Notwithstanding those exceptions to the best of my knowledge, there's no tribal government that has promulgated the right of employees of tribal gaming facilities to organize and to bargain collectively.

So given those facts, Mr. Anderson, I would be interested to know if the State of California or any other state were to insist to the point of impasse on the right of the employees of a tribal casino to organize a union and to bargain collectively, in your opinion, would that constitute bad faith on the part of that state?

MR. ANDERSON: I can't give you a definitive answer now. Let me just back up, though, in terms of the scope of the federal labor laws that apply across the country, haven't some cases been held not to be applicable to Indian tribes? The basic rule of law there is, do general laws of application, whether it's the right to collective bargaining, OSHA regulations, Fair Labor Standards Act, do they specifically mention Indian tribes in their governing legislation?

There's been a principle of the Supreme Court that in dealing with sovereign nations within our federal system, that Congress must be clear and unequivocal when it applies such laws to other inherent sovereign entities. Because of that, to answer your question whether that would be good faith or not would
really require an analysis of whether the NLRB considers those
laws to apply.

In my quick memory check, I think the NLRB in San
Francisco says those laws do not apply.

COMMISSIONER WILHELM: Respectfully, Mr. Anderson,
that statement makes absolutely no sense whatsoever. I don't
think there's any reasonable doubt that the National Labor
Relations Act does not apply to employees of tribal entities. I
think that's a fairly settled question. That's not the question
I was asking.

Precisely for that reason the employees of tribal
gaming facilities don't have the right to organize a union and
bargaining collectively. Obviously, if the National Labor
Relations Act applied they'd have that right. We wouldn't be
talking about this. They don't under the National Labor
Relations Act. So if the State of California or some other state
takes the position that because it's the policy of the United
States of America that workers generally ought to have the right
to organize because it's the policy of most of the states in this
country that workers generally ought to have the right to
organize, because it's the policy of the United States of America
in many applications that workers everywhere ought to have the
right to organize and because this Commission collected testimony
this week that I believe is undisputed that in the case of the
California tribal casinos more than 95 percent of the non-
managerial employees who work in them are not Indians, they are
ordinary workers in the State of California just like anybody
else who works in the hospitality and gaming industry in the State of California.

So given all of those facts, would it be the position of the Department of the Interior that a state that, in this example California, if it were it insist to the point of impasse on the right to organize because the federal labor laws don't apply and, therefore, those workers are in a legal no man's land, what would be the position of the Department of the Interior?

MR. ANDERSON: It may well be that that is an act of good faith. I can't say definitively. The only other issue we've confronted Pala, as you mentioned. There, though, the state and the tribe agreed that this was related to gaming. These were activities --

COMMISSIONER WILHELM: Sure, that was a softball as you put it.

MR. ANDERSON: Right.

COMMISSIONER WILHELM: I agreed.

MR. ANDERSON: Without any definitive facts, it would be difficult to answer in the abstract. It may well be if the tribe refuses to negotiate on that point or believes it has a viable alternative under tribal law, it may well be that that is, given the context of negotiations between Sioux sovereigns it would be bad faith for the state to refuse to sign a compact where they cannot reach agreement with the tribe on that issue.

I think you'd have to look at the facts and circumstances. Is there some alternative that the tribe has in place.
COMMISSIONER WILHELM: It wasn't bad faith for the government of the United States to insist in the North American Free Trade Agreement that workers in Mexico ought to have some rights, I don't think. Now, maybe it was. Perhaps it's the position of the Department of the Interior that the Clinton Administration was acting in bad faith in making those demands.

Okay, I'm sorry, I didn't mean to belabor that to that length but you are in the wonderful world of good faith and it's a very complicated world. Another example --

MR. ANDERSON: I'd only mention that good faith in that case works two ways and if the tribe has its own labor laws in place or has a plan to, is it bad faith then for the tribe to insist on that as a condition of bargaining?

COMMISSIONER WILHELM: My final point on --

CHAIRPERSON JAMES: Before you move onto your next point, I just wanted to hear Mr. Gede's comments on the question that you put to Mr. Anderson, if you don't mind.

COMMISSIONER WILHELM: Certainly.

MR. GEDE: Thank you. There is some difficulty here, in my view, as to coming to impasse. Unlike labor negotiations, the negotiations in IGRA are between two sovereign governments in which they are engaging their legislative discretion to permit an activity which is -- which a legislature normally would permit under a compact, we don't just call it a contract. And so we're talking about governmental activity at its highest level.

The point I made earlier was that it's too easy to get to bad faith and if there were incentives to allow legitimate differences of opinion to continue to be discussed at the table
before somebody raises the bad faith flag, then both parties
would be better off. What happens now is that any legitimate
difference of opinion results in somebody hoisted the bad faith
flag and it only goes against one party, the state.

In this particular case, I see no reason why you
can't come to impasse over legitimate differences. IGRA already
suggests that it's bad faith for the state to insist upon
taxation or anything other than reasonable administrative fees
for the gaming. There's no reason why Congress can't itemize
certain areas which are just bad faith. Everything else should
be good faith and then you're not off to court the minute
somebody has a legitimate disagreement and you could come to
impasse.

Now, the tribes frequently say impasse is
unacceptable because gaming is a right that the tribe should have
and the state shouldn't be able to stop it, but the point that
I'm making is that there may be legitimate differences of opinion
over legitimate policy issues that are the subject of the
legislative discretion of the two sides and when they come to
loggerheads and one side doesn't want to back down, that's an
impasse. And because there's two sovereign governments, it
should just be left at an impasse rather than having the
Secretary of the Interior jump into the middle of it and say,
"We're the federal mediator, we can take this sovereign
government, that sovereign government an mediate it.

If the rule goes forward, it will be litigated, the
states will bring lawsuits. Alabama and Florida will be first in
the door to litigate against it and I think that Senators Enzi
and Sessions (ph) already have an extension of the current
moratorium that is before the United States Senate
Appropriations.

CHAIRPERSON JAMES: I don't mean to be flippant about
this at all but I have to express my concern about the Secretary
of Interior imposing federal -- the Federal Government in a
middle of a dispute between a governor and another -- well, if
it's two sovereign entities, then how about the Secretary of the
State?

MR. GEDE: Madam Chairman, can I clarify something
and with all due respect to Mr. Anderson? The proposed
regulation by the Secretary is not triggered on some breakdown in
the discussions between the state and the tribe. It's triggered
by a federal court dismissal under the 11th Amendment. If a
state is sued by a tribe for bad faith because they raised the
bad faith flag so rapidly and the state raises the 11th Amendment
in court as a jurisdictional bar, it need not. California has
never raised it. Under odd circumstances we did, but we don't
raise it as a rule.

And if the federal court says, "You're right, this is
an 11th Amendment jurisdictional bar", and dismisses the case,
the proposed regulation would kick in and the good faith and bad
faith of the parties is only one of multiple considerations that
the Secretary gives to the equation at that point. We've even
recommended that good faith shouldn't even be part of the
discussion for the Secretary. If the rule were to be upheld as
constitutional, which we doubt, we wouldn't even want bad
faith/good faith to be in there because we don't like the idea of
the Secretary passing -- we find it fundamentally offensive to
the state sovereignty to have the Secretary of Interior of the
Federal Government pass on our good faith or bad faith just as
much as I assume the tribes would find it offensive to have the
Secretary of the Interior pass on the good faith or the bad faith
of the tribes. It shouldn't even be part of that equation.

The occasion is triggered solely by the federal court
dismissal under the 11th Amendment.

CHAIRPERSON JAMES: Thank you. That was sort of my
point but you said it so much better.

MR. ANDERSON: Madam Chairman, if I could expand on
that point and I did make that point in the opening that, yes,
this is -- a tribe and the state can always avoid the Secretary
by simply either agreeing or as the state waives its sovereign
immunity having a court decide but you expressed concern about
the secretarial procedures and the role. That has, in fact, been
the law for the last 10 years and when President Reagan signed
this law and Congress enacted it, it -- the procedure of having
the Secretary ultimately making the decisions has been the law
for 10 years.

So I want to disagree slightly with Mr. Wilhelm that
problem has always been out there, that the Secretary could be
the final arbitrator of this. Notwithstanding that, at least 24
states have come to agreement with tribes on these issues. So
it's not be the impediment. There's only been two times
procedures have been at issue and that's in the State of Arizona
here and in Connecticut. So even if this rule becomes a final
rule for the Administration, we expect it's not going to be used very often, if at all.

CHAIRPERSON JAMES: Commissioner Wilhelm?

COMMISSIONER WILHELM: The last point I wanted to make about good faith is, you know, one way of looking at negotiations is negotiations inherently are exercises in mutual coercion. You can look at them as persuasion as well. In some ways they are exercises in mutual coercion, so I'm troubled by your statement that, well, somebody said that they were coerced. Well, I don't ever remember settling a labor agreement even with employers with whom we had wonderful relationships, we didn't feel coerced in some fashion. Otherwise we would have got the whole kitchen sink.

So as an example, we had repetitive testimony yesterday from tribes which have reached compact agreements with the State of California which have signed them and which are on their way to you who said, "Well, we signed these things with a gun to our head". Well, so you're going to reject them because they were coerced, that's tough territory.

Having said that, I have a specific question on another point of view, Mr. Anderson. You made the observation that I believe our research subcommittee and probably the whole Commission would very much agree with, that it would be valuable for this commission to try to determine the real revenue picture with respect to tribal gambling in the United States because as you said, there is no definitively reliable available, publicly available information on that and I wondered if we, to the extent that the Department can or to the extent that the Department is
in possession or has access to some of that information, could
the Commission have your Department's cooperation with respect to
that effort?

MR. ANDERSON: Yes, certainly. Most of it has been
provided in hearing from the tribes themselves in the hearing
process, but whatever information we have, we'll certainly
provide it to Director Kelly.

COMMISSIONER LOESCHER: Madam Chairman.

CHAIRPERSON JAMES: Certainly, Commissioner Loescher.

COMMISSIONER LOESCHER: A point of order, yes, a
point of order on that; the tribes have represented and certainly
our statute represents that information can be secured through
other governmental agencies of the Federal Government under cloak
of confidentiality and so we have that ability to deal -- to
secure information on that basis. And I wouldn't want it to go
forward here to say that the information that the tribes have
provided through the Indian Gaming Commission and through the
Secretary's office and the Bureau of Indian Affairs that's held
confidential would not be held confidential.

So we should make that clarification.

CHAIRPERSON JAMES: Yes, that certainly is the case.

Any information which is in the public purview is certainly open
to this Commission to have and to access. Any information that
comes into the hands of this particular Commission that is of a
proprietary nature would, indeed, be protected in that way by the
Commission itself and the staff.

MR. ANDERSON: I understand, Madam Chairwoman. The
tribes actually would like to get this information out because it
shows a truer picture of what the benefit would be. I think
you'd find cooperation from them.

CHAIRPERSON JAMES: Certainly. Commissioner Dobson.

COMMISSIONER DOBSON: I know that we're running late.

Let me just ask a real quick question. It may not be a softball,
but it will be a fast ball. (Laughter)

COMMISSIONER DOBSON: We heard earlier today that
there is an assumption -- perhaps a belief in Washington and in
other places, that there are large numbers of so-called rich
Indians that are coming out of the tribes where there are casinos
and so on and I know that that is a cliché. But can you tell me
if there has ever been a reduction of federal subsidies in any
instance where there has been a very lucrative, perhaps even
small tribe on the basis of the amount of money that has been
brought in?

MR. ANDERSON: Yes, Mr. Dobson. A handful of tribes
have voluntarily relinquished their federal funds and returned it
back to their area offices of the BIA for the use of other tribes
in their areas, so that reduction has occurred. It's not been a
mandatory requirement of the Federal Government. We do have
programs, whether it's attorney fees programs or general
assistance that have a means testing component to it. Obviously,
if no one at the reservation is eligible for AFDC, they're not
going to receive that from the Federal Government.

As far as their general operating funds, some of the
most successful tribes have returned their money. What they have
asked for, though, in the bargain in returning that money is that
the federal trust responsibility, the federal pre-emption of
trust lands of the federal relationship not be diminished. That is what is of critical concern to them is that the relationship simply because they've done well financially, is not diminished by not receiving federal funds.

If we can make sure that link is secure with the Federal Government so that we still as a government represent their interests as a trustee, I think you'll see more tribes voluntarily giving their money back to the government.

COMMISSIONER DOBSON: But it's all been voluntary.

MR. ANDERSON: Yes.

COMMISSIONER DOBSON: There's no mechanism at all for the Federal Government to reduce federal subsidies.

MR. ANDERSON: That's correct. Of the 557 federally recognized tribes, the three or four wealthy tribes have certainly been open to that idea.

COMMISSIONER LOESCHER: Madam Chairman.

CHAIRPERSON JAMES: Commissioner Loescher and then I'm going to go --

COMMISSIONER LOESCHER: I promise to ask only one question since all the other questions have been asked fairly well. I can't resist when you have an attorney general from a state and then we have a representative from the governors to ask this question which I've asked of all attorney generals that have appeared before this Commission. You know, given the fact that gaming among the states crosses boundaries, it's in the multi-millions of dollars, it effects a lot of people and jobs and just the constituencies involved, the fact that there's government to government relations among Indian tribes and even among states
over this issue, given all of the growth and controversy over

gaming in America, would you -- what would be your view if the

United States, under the interstate commerce clause regulated all
gambling in America creating standards and guidelines and
mechanisms for dispute resolution and revenue sharing as a matter
of federal policy across America?

MR. SCHEPPACH: I'm facing or the states are facing
pre-emption in insurance of health and interstate taxes on the
Internet, banking, security legislation and now you want to add
to the plate gambling. I think we've got a very, very serious
problem in this country about federal pre-emption of state
authority and so I would say that my knee jerk reaction would be
we would probably oppose it.

MR. GEDE: I would add that unlike other commercial
enterprises; selling shoes, growing and selling rice, gambling
has been in the traditional province of the states to criminalize
or decriminalize as they see fit. Gambling, the subject of your
study has occupied a unique niche in which the country as a whole
has seen it as something that should be criminalized in some
cases and decriminalized in other cases. As such, it is
traditionally within the province of the states to control and to
regulate. It has never been seen as the subject of a federal
matter under the Constitution.

I imagine that Congress could assert its power under
the interstate commerce clause to, quote, "regulate gaming", as a
federal matter but there might be serious 10th Amendment problems
with that because as to the criminal law side of it, the Federal
Government under the interstate commerce clause, cannot willy-
nilly go about decriminalizing laws that states have adopted to
protect their citizens under their traditional reservoir of the
criminal law and here you are touching upon the criminal law.
And so I think Congress would have serious constitutional
problems if it attempted to do so.

COMMISSIONER LOESCHER: Thank you, Madam Chairman.

CHAIRPERSON JAMES: Thank you. Commissioner Wilhelm.

COMMISSIONER WILHELM: Mr. Coin, I would like to read
a brief excerpt from your written testimony that you didn't have
an opportunity to give within the time you were allotted. You
say, "We challenge this Commission to look beyond the
shortsighted view of some who hold that gaming is simply
immoral", and you say, "Poverty is immoral, hunger is immoral,
joblessness is immoral, disease is immoral. Gaming is a means
for Indian nations to end the immoralities heaped upon them
throughout 225 years of history".

I tried in earlier meetings of this Commission with
dramatically less eloquence than those words of yours to make a
comparable argument with respect to some of the most depressed
cities in this country, Atlantic City, for example. We had
lengthy testimony about the horrendous economic conditions in
Atlantic City prior to the decision by that community to adopt
and legalize gaming, or the city of Bridgeport, Connecticut,
statistically the third poorest city in America whose citizens
voted in excess of 80 percent to have gaming so they'd have some
economic base and whose wealthy neighbors legislatively prevented
them from doing so.
I would just like -- I wanted that statement to be in front of this Commission because it's, I think, both extraordinarily eloquent and completely accurate and I would hope that my colleagues on the Commission would recognize that when they weigh up what's moral and what's immoral, that we have to consider what is happening in this country particularly to people who don't have advanced education. Just in the last week there's two horrifying articles in the Los Angeles Times. One of them said that one out of three children in the State of California are living in poverty. And other one said that skid row in downtown Los Angeles, historically mainly a place for single men, is increasingly populated by women and children.

We're in trouble in this country. Indian reservations because what has been done historically, are in more trouble but we're in trouble and I think I agree with you that gaming has to be an available option to those peoples and those governments who think it makes sense as one way to deal with the economic crisis and I thank you for your much better way of putting that than I have been able to.

Mr. Coin: Commissioner Wilhelm, if I may, Madam Chair; there are a couple of I think real important benefits that we tend to overlook. One of them clearly is the impacts that the gaming opportunity has brought to reservations. There have been some that would suggest that tribes are using gaming simply as a basis for an economy. Tribes, without exception, around the country have emphatically denied that premise.

Instead they are saying that gaming provides the only means to a legitimate economy and we need to underscore that. The
fact that tribes in their wisdom have understood that gaming may not be around forever. And so the need for tribes now to use this very small window of opportunity to take their revenues, to invest in diversified economies, to invest in new ventures, to invest in new opportunities, I think that's what our tribal leaders are trying to do, recognizing again that the states' rights and all other angles of arguments that will come upon us in relatively quick time will force tribes to, I think, make some serious -- undertake some serious planning with respect to creating these economies on their own reservations.

CHAIRPERSON JAMES: At the risk of being misunderstood and misquoted, let me take a point of privilege and make a comment. I want to agree with my newfound good friend, Mr. Wilhelm, absolutely with the litany of issues that were raised that I think every one of these Commissioners would absolutely agree are deplorable and, indeed, immoral conditions within our country.

I said at the first Commission meeting that I believe that morality and immorality have a place in the public policy debate even on this issue and I challenged those individuals who were concerned about that to come along side this Commission and engage in a public debate on that subject. However, given the mandate that we were given by Congress to talk about the social and the economic impact of gambling, it is totally outside the purview of this particular Commission.

But I don't want to leave the impression that it has no place in the public debate, it just doesn't have a place in this particular commission because I think it's important in any
public policy debate to always engage in those kinds of
discussions. Commissioner Dobson.

COMMISSIONER DOBSON: Madam Chairman, I can't resist
but to respond to my good friend, Chairman Wilhelm (sic) about
the comment --

CHAIRPERSON JAMES: You can't give him my job.

COMMISSIONER DOBSON: -- that he just made because
obviously, I disagree very strongly with portions of that comment
where he sees homelessness and street people and poverty as the
solution to those difficulties through gambling but in my view
the source of those problems in some cases. We were just in
Atlantic City. We visited a homeless shelter there and heard
from the individuals who run that shelter there that many of the
people who come there are because of gambling and because of
addictions to gambling and they got in trouble in that way.

So I think gambling is not the solution to the
poverty of this country. It is the problem or at least a portion
of the problem.

COMMISSIONER MOORE: Madam Chairman?

CHAIRPERSON JAMES: Commissioner Moore. We're going
to hear some real wisdom now.

COMMISSIONER MOORE: Being so-called chairman of the
subcommittee on Indian gaming, I don't know why, Kay dislikes me
so I think that I know why, the remarks that I might make will
not be funny to someone. I'll put a little humor in them but you
know, Mississippi was one of the southern states and we thought
we needed southern rights, states rights, but the Yankees whipped
us 133 years ago and we had to succumb and I've almost forgot all
of that, never did know much about it because I never did own a
slave, didn't bring any of them over here on a boat, never have
mistreated one.

My friends, I have friends who are black people. The
literature tells us, what little I've read, that one of the
troubles with our racial problems today is that we're afraid to
talk about it in the work place. I'm not afraid to talk about it
in the work place. I'm a director of a radiology department of
65, probably half of them are Native Americans, not Native
Americans, Afro Americans. We get along fine.

I consider my Indian friends, which I told them in
San Diego, I grew up with the Choctaw Indians, played baseball
with them, picked cotton with them, plowed if any of you know
what that is. I've even read in the literature where it would
probably be better to take care of some of Mr. Anderson's
problems of the Indian tribe if they did not live on a
reservation, that maybe the reservation living is a part of that
problem.

Now, I know that they have sovereign rights, nothing
I can do about that. I even learned yesterday that when I went
to the Mobile Airport and got a parking ticket, that that was a
slot machine. I had no idea that a lot machine was a slot
machine. I thought that was a thing that gave you a ticket and I
believed that you could take a pencil and push it and it would
give you an airplane ticket or it might give you something else.
Now, that was one of the arguments.

Now, I don't believe in government interference to a
degree but I consider the Native American not only a sovereign
nation, if they want to say that, but you're an American citizen. You get all of the benefits that I get. With all these others that they're giving you, you're getting more than me. I don't know whether I like that or not. You're a sovereign nation. I asked yesterday why you didn't take all this money and put it in a pool and help your fellow man, because someone said that there are tribes that are just making it.

The United States Government, we give money to other countries in foreign policy. I don't like that much but we do. So what I'm saying is that maybe we need a federal regulation to come out and tell everyone, tell them in Nevada -- it's Nevada, I'm sorry -- to tell them in Nevada, tell them in California, whether it's corporate gambling or whether it's Indian gambling, what all of these classes are. What is Class III? Let them list them. It's got to be a slot machine that you put a quarter in and if you get three cherries, you get 75 cents, instead of all of this other, and then it would not be any negotiation, there wouldn't be any of this bad faith stuff.

You look down your list and you come to number three and you say, "Buddy, you can't have it. We don't have it and you can't have it". It doesn't matter if it's in Las Vegas or it doesn't matter where it is, Tempe, Arizona. And I believe that when this Commission gets together and we start writing, I'm only speaking for myself but I can hear everyone talk, I believe that we will ask Mr. Anderson's department or the Senate or the House to do something to clarify all of this.

I would hate like heck to be the governor of California with 107 nations inside my borders. Why we could have
107 armies. That would be something. We'd be fighting each other all day, shooting over the borders. So I believe if we have, even though I recognize that you have a right, I probably even recognize that you were treated wrong at one time.

Someone was probably here, as my friend, Mr. Loescher said, this is the first time that I have to see him, that you people probably took the land from someone. I believe I'm right in quoting him on that. You know, we were being funny. It's probably a dream but these are serious problems and I just hope that you understand when we get ready to write a report that we've got a hell of a problem. I just hope that everyone out there understands this, but we're going to come out with a good one, you can bet your bottom dollar on it.

Commissioner Loescher: Madam Chairman?

Chairperson James: I will give the final word to Commissioner Loescher and then we will take a break.

Commissioner Loescher: Thank you, Madam Chairman. I don't philosophize very much on the Commission, but it is an interesting panel we have here and the Commissioners are talking. You know, in any other kind of industry the Department of Justice and the Securities and Exchange Commission would weigh in when they saw competing, huge competing parties like states involved in gambling and lotteries and whatnot, tribal entities, the private sector. When they have too much imbalance and controversy, the Department of Justice would step in and the SEC would step in and private sector and then they would weigh in.

In this situation, we have -- and you know, I look at our statute for this Commission, we have some extraordinary
challenges to try to define and express in a report and as mere mortal citizens, we are dealing with sovereigns; the United States, the state governments, tribal governments and you wonder where all this goes. But you look at the situation where Native Americans are and you think to yourself, my goodness, 33 governors are weighing in on this issue, 20 attorneys general appear on issues. It goes on and on and the Native Americans, you know, they're just trying to survive. They're trying to deal with what they can under their governmental structures and their place in the community.

And you look at where they're at, they're under the U.S. Constitution, the Congress gets to oversee what they do and then there's a concern about the Secretary and there was a statement here by the Chairman worried about what the Secretary is doing. My goodness, as a Native American, if the Secretary wasn't weighing in on behalf of Native Americans, I'd be concerned because that's their job. They have a trust responsibility.

But just to sort of end this little colloquy, there's a difference and I think the panels that we're seeing in California, here in Tempe, in Gila River tomorrow and then Albuquerque, I hope these tribal leaders are expressing to the Commissioners that it's not -- you know, they see gaming as a fleeting opportunity. They're concerned about their culture, how it impacts the tribal government but the bottom line is that they're using these gaming revenues to improve the community and maintain the culture of their people and improve the quality of lives of their people. That's what I'm hearing.
In the face of all of this, Native Americans are only 11 percent of gaming in America, yet they draw the largest interest that we've seen in the Congress and among the states and whatnot. So hopefully as we move forward to draw this into a report, we can keep all of this in balance and remember the testimony that we received from so many of these tribal chairmen.

CHAIRPERSON JAMES: Let me thank you panelists. This has been very informative. The testimony that you've offered today helps us to understand, indeed, how truly complex this issue is. We would ask that you stay in very close contact with this Commission as we go through our deliberations and that we can call on your expertise and your counsel and your wisdom as we begin the drafting of our final report.

Let me also say to the Commissioners that in looking at our schedule because I do realize that we are under time constraints, there are planes that people must catch, there are appointments that people have to keep, that I intend to try to make up some of this time during our lunch work session and I think we can gain most of it back there.

I would like to go ahead and take a break right now and see if we can come back together at 11:20. Thank you.