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

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

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

I start with the background or proposition that any tribal casino or bingo hall will have an
effect on citizens throughout the state, and indeed throughout other states as well.

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

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

Now the constitutional issues that I will discuss arise from the indisputable fact that every Indian gambling enterprise has at least three
sovereigns involved. The United States, the tribe and
the state. In IGRA, the Congress chose to include the
states, we could have a debate about whether Congress
had to make that choice, whether it could have excluded
states, but it did include the states and I think for
very wise reasons. Without including the states you
have a system that would take away the ability of state
citizens and officials to affect their quality of life.
Presumably it would involve the imposition of federal
rules on the local matters, on locally sensitive
matters I should say. It would have required a large
new federal bureaucracy and probably an unfortunate
bureaucracy. So including the states was an important
thing to do.

Now having said that, I also acknowledge
that Congress put very significant limitations upon the
roles of the states in what they could do. And it did
so in recognition of tribal sovereignty, which I think
is an indisputable given in this area. And indeed,
that tribal sovereignty is at the heart of Indian
I wanted to discuss is really in the heart of federalism, which has already come up this afternoon. And that issue involves the 11th Amendment to the United States Constitution. The original scheme of IGRA was that if the states refused to negotiate in good faith with the tribe, the tribe could then sue the state in federal court and ask a federal judge to examine whether the state had negotiated in good faith.

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

Two years ago, the United States Supreme Court put an end to such lawsuits in a case called, Seminole Tribe of Florida V. Florida and I have
provided footnotes to my remarks, which I know is a
little unusual, but I find it hard to discuss legal
issues without doing that. The Supreme Court basically
held that Congress does not have the power to override
the states immunity to sue in federal court.

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

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

Now the emphasis on the 11th Amendment due
to the Supreme Court case has deemphasized other
constitutional issues that had arisen in the areas of Native American gambling. And the only one that I will mention here is the issue of the 10th Amendment to the United States Constitution, which gives all powers not held by the United States to the states and to their citizens.

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

Now the other set of constitutional issues that I think is crucial in this area involves state constitutions. And while you might think that we're dealing with 50 different rules there, or more than 50, if you count commonwealths and districts, in fact the
state constitutional issues I'm talking about here are fairly consistent, it appears, throughout the states, at least as reflected in the reported decisions.

The issue that I'm talking about is who speaks for the state in its negotiations with another sovereign, namely the tribe. And it comes up in two particular areas. The main area that has been litigated to date is who speaks for the state in entering into a Class III or casino gambling compact. And the answers that have come from the state courts and most of the federal courts is that if the governor is going to be signing the compact it has to be authorized by the legislature. Why, well because a compact involves issues that are inherently legislative in nature. It often expands gambling beyond what otherwise would be allowed in the state. It often creates new agencies. It affects the jurisdiction between the state and the tribe. And these are essentially legislative matters.
There have been times when tribes and governors acting unilaterally have entered into compacts and the courts have generally struck those down.

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

And on after-acquired property gambling cannot occur unless first of all the Secretary of Interior makes a particular finding, land that has been taken into trust of course, and unless the governor concurs in the Department of Interior's finding. And the state constitutional issue comes at that third
stage. When a governor concurs what does she or he have to have by way state authority.

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

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

And finally, in the interest of completeness and to really put a perspective on the Massachusetts' situation, I would point out that we
have a settlement act with the Wampanoag Tribe, which
was a negotiated arrangement resolving a land dispute
on Gay Head, an island off, well on Martha's Vineyard,
an island off of Massachusetts. And this settlement
act was entered into by the tribe and the Commonwealth,
it was enacted by the Massachusetts legislature,
enacted by the United States Congress. And that act
gives the Commonwealth more authority then it generally
otherwise would have to regulate or prohibit gambling
in the Commonwealth. And I know the tribe and we have
a debate over it to the extent to which that is true,
but I think it's fairly well established that it is
true at least to some extent.

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

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

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

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

CHAIRPERSON JAMES: Thank you.