CHAIRMAN JAMES: Mr. Kelly.

MR. KELLY: Thank you. My name is Joseph Kelly. I appreciate you giving me the opportunity to speak today. Although I am an associate professor at Suni College, Buffalo and co-chair of the International Bar Association Section on Gaming and Sports Law, my remarks today are my own.

This Commission is not unique in trying to recommend what to do about Internet gaming, when the site is outside one's country and the players are U.S. citizens. This May the European gaming regulators have met in Helsinki to discuss this issue, as have South African regulators meeting in South Africa.

Predictions of Internet gaming have been exaggerated. For example, on May 5th, 1998 Gina Smith of ABC stated that by the year 2000, Internet gambling might be a $60 billion per year business. There does, however, seem to be a consensus on two things. First, if the Kyl bill becomes law, the amount of Internet gaming will be reduced. It is essential to point out that a number of operators in the Caribbean, a significant number, will not take bets or casino wagers from the United States.

On the other hand, one or more Australian states legalize Internet gambling, then the amount of Internet gambling revenue would increase considerably. One Australian lawyer, for example, informed me that he has been approached by an Native American tribe about being licensed for Internet gaming in an Australian state. The first issue I'd like to address is prohibition internationally.
It is essential to note that international gambling is already viable in certain countries. Furthermore, the Kyl bill no longer attempts to exercise extra-territorial jurisdiction. The latest version I think says that the Attorneys General, together with the Secretary of State, the Secretary of Commerce and others, should try to work with other jurisdictions on Internet gaming, but no longer is there any sign of taking legal action.

I'd like to talk today about three countries; Liechtenstein, Australia and Antigua. Liechtenstein has had an Internet lottery since 1995, and recently has involved the International Red Cross, when revenues have fallen far below expectations. In 1998 Liechtenstein and the International Red Cross developed Millions 2000, an Internet lottery. Millions 2000 expects the year 2000 to create 2,000 millionaires and will be open to players in every country, Saudi Arabia, North Korea, you name it. I want to stress this for the benefit of the Commissioners.

The American Red Cross has decided not to participate. I'd like to repeat that. The American Red Cross has decided not to participate. But what would the United States have done if the American Red Cross did participate? Would it be possible that some overzealous law enforcement official might arrest Mrs. Elizabeth Dole pursuant to a criminal conspiracy complaint alleging violation of the Wire Act and RICO? Even Democratic friends of mine would release her on her own recognizance and not require bail. But this thing could get very, very complicated. Nobody expect for the Attorney General of Minnesota has expressed interest in the Liechtenstein lottery.
Unlike Liechtenstein, American gaming regulators are seriously concerned about the legalization of Internet gaming by Australian states. Australian officials are unconcerned about the impact of the Kyl bill, even when it seemed to have extraterritorial application. As one cabinet official in New South Wales, not Victoria, explained to me in August, 1997 with a smirk, quote, "If the Kyl bill becomes law, so much the better for us," unquote.

As you know, Queensland in March, 1998 enacted legislation regulating Internet gambling and soon will be issuing regulations in this area. The Queensland treasurer stated, quote, "With everything online and recorded in central computers, regulators will be able to monitor games more easily than, say, a blackjack table in a real casino. All bets and plays will be recorded."

Unlike Australia and Liechtenstein, Antigua has no strong regulatory control over gambling. In fact, as governmental officials would admit, Antigua has often been viewed as a haven for most questionable activity such as the Russian Internet bank that failed. Antigua now seems to be serious in weeding out undesirable elements. The issue is whether the Wire Act and perhaps the Kyl bill if it becomes law would be enforceable against Internet operators in Antigua.

In March, 1998 the U.S. Attorney in Manhattan filed criminal complaints against 21 individuals, some of whom operated out of Antigua. In my opinion the U.S. Attorney seemed to have satisfied the minimum contacts necessary for jurisdiction. For example, all defendants used 800 numbers; they used facilities such as the U.S. mail or U.S. banks; and all defendants were U.S.
citizens. Predictably the Antiguan government was concerned what might be considered interference in a legal licensed activity.

Now, let's change the facts slightly. Assume the players are from the United Stated but the operators use only online betting and not the telephone and the operators do not use U.S. mail or U.S. banks and the operation is run by a shell corporation, one of these devices where you would incorporate in the Cayman Islands and then incorporate somewhere else and that corporation operates the Internet casino in the Caribbean. Would the Wire Act be applicable?

In my opinion it would be very, very difficult to apply it extra-territorially. Then what would happen? Would gaming regulators, law enforcement officials then go after the five dollar bettor, through a special Internet gaming enforcement squad? You could imagine the problems with invasion of privacy here. It could be done with wire taps but it would be awfully expensive.

The second issue I would like to address would be Native American Internet games. The approach I recommend to the Commission, to paraphrase the remarks of a political figure, is to take a deep breath, relax and let the law develop. Unfortunately the Native American Gaming Commission, the three member administrative agency created by IGRA, has apparently decided not to decide as to a regulatory approach to Native American gaming. They had a full day hearing on November 14th, 1997 where they asked speakers to address relevant issues on Native American Internet gaming. Unfortunately, there is no way to make an administrative agency issue regulations if the administrative agency does not want to do so.
So the administrative agency that could be helpful to us, apparently will not be.

The basic issue today in my opinion in Native American gaming is what to do about the Coeur d'Alene. Now, there are two key issues here. First of all, does a provider such as AT&T have to provide services to the Coeur d'Alene? And they call their lottery, U.S. Lottery. A tribal court and a tribal appellate court has ordered AT&T to provide services. On the other hand, many Attorneys General have said that if services are provided, AT&T will violate the Wire Act and be subject to criminal penalty. You don't have to be a lawyer to understand this. You are in jeopardy if you provide services. On the other hand, you are in jeopardy if you don't provide services. Clearly there's a problem.

What AT&T did is what any good lawyer would advise; ask a federal Court in the state of Idaho, which is where the Coeur d'Alene case is, to tell us in a declaratory judgment what do we do, please. What will happen? Nothing in the immediate future. Many of the Attorneys General have filed friends of the Court briefs and don't expect anything to happen on this issue in quite some time.

The second issue I think that's very, very important is why you should relax because as far as Native American gaming, is because right now the Attorneys General of Missouri and Wisconsin have filed litigation against the Coeur d'Alene and the operators. The result always seems to be the same. They file in State Court. It's removed to Federal Court. The Federal Judge says the Coeur d'Alene are immune to litigation because of sovereign immunity, but the Internet operator, in this case
Unistar, may not be immune. If Unistar is not immune, then of course, it's of no use to the Coeur d'Alene that they may be immune. As Alan Kesner pointed out today, it's important to wait until the United States Supreme Court decides an issue not dealing with Internet gambling, but an analogous point dealing with liability and sovereign immunity for tribal activity off the reservation.

And we haven't come to a decision from the United States Supreme Court yet, but it could come out very soon.

Two other points I'd like to make very quickly. Liechtenstein sees the Coeur d'Alene U.S. Lottery as its major competitor. I don't gamble. I'd rather watch paint dry. If I did gamble, I would not gamble on the lottery. But if I did gamble on the lottery, and I had a choice between the Liechtenstein lottery and our own Coeur d'Alene lottery and if I played the Coeur d'Alene lottery, proceeds would be used to benefit Native Americans, I would certainly pick that over the Liechtenstein lottery. And last, very quickly, beware -- and the Attorneys General of Wisconsin and Missouri have not done this -- beware of cheap sensationalist type activities often used by some Attorneys General.

For example, one Attorney General decided he would persuade Western Union not to transmit monies going between his state and the West Indies. And he was successful at this. What did the Internet companies in the West Indies do? They simply used the word insurance in their address and all sorts of money then went from that state to an Internet casino, where it entered that sports book, quote, "insurance company." The only thing...
this did at first is it seemed to make Federal Express very, very 
wealthy because it was used as a substitute for Western Union. 

Thank you very much.

CHAIRMAN JAMES: Thank you, Mr. Kelly.