

1 JOE KELLY

2
3 CHAIRMAN JAMES: Mr. Kelly.

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

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

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

23 On the other hand, one or more Australian states
24 legalize Internet gambling, then the amount of Internet gambling
25 revenue would increase considerably. One Australian lawyer, for
26 example, informed me that he has been approached by an Native
27 American tribe about being licensed for Internet gaming in an
28 Australian state. The first issue I'd like to address is
29 prohibition internationally.

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1 It is essential to note that international gambling
2 is already viable in certain countries. Furthermore, the Kyl
3 bill no longer attempts to exercise extra-territorial
4 jurisdiction. The latest version I think says that the Attorneys
5 General, together with the Secretary of State, the Secretary of
6 Commerce and others, should try to work with other jurisdictions
7 on Internet gaming, but no longer is there any sign of taking
8 legal action.

9 I'd like to talk today about three countries;
10 Liechtenstein, Australia and Antigua. Liechtenstein has had an
11 Internet lottery since 1995, and recently has involved the
12 International Red Cross, when revenues have fallen far below
13 expectations. In 1998 Liechtenstein and the International Red
14 Cross developed Millions 2000, an Internet lottery. Millions
15 2000 expects the year 2000 to create 2,000 millionaires and will
16 be open to players in every country, Saudi Arabia, North Korea,
17 you name it. I want to stress this for the benefit of the
18 Commissioners.

19 The American Red Cross has decided not to
20 participate. I'd like to repeat that. The American Red Cross
21 has decided not to participate. But what would the United States
22 have done if the American Red Cross did participate? Would it be
23 possible that some overzealous law enforcement official might
24 arrest Mrs. Elizabeth Dole pursuant to a criminal conspiracy
25 complaint alleging violation of the Wire Act and RICO? Even
26 Democratic friends of mine would release her on her own
27 recognizance and not require bail. But this thing could get
28 very, very complicated. Nobody expect for the Attorney General
29 of Minnesota has expressed interest in the Liechtenstein lottery.

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1 Unlike Liechtenstein, American gaming regulators are
2 seriously concerned about the legalization of Internet gaming by
3 Australian states. Australian officials are unconcerned about
4 the impact of the Kyl bill, even when it seemed to have extra-
5 territorial application. As one cabinet official in New South
6 Wales, not Victoria, explained to me in August, 1997 with a
7 smirk, quote, "If the Kyl bill becomes law, so much the better
8 for us," unquote.

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

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

24 In March, 1998 the U.S. Attorney in Manhattan filed
25 criminal complaints against 21 individuals, some of whom operated
26 out of Antigua. In my opinion the U.S. Attorney seemed to have
27 satisfied the minimum contacts necessary for jurisdiction. For
28 example, all defendants used 800 numbers; they used facilities
29 such as the U.S. mail or U.S. banks; and all defendants were U.S.

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1 citizens. Predictably the Antiguan government was concerned what
2 might be considered interference in a legal licensed activity.

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

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

18 The second issue I would like to address would be
19 Native American Internet games. The approach I recommend to the
20 Commission, to paraphrase the remarks of a political figure, is
21 to take a deep breath, relax and let the law develop.
22 Unfortunately the Native American Gaming Commission, the three
23 member administrative agency created by IGRA, has apparently
24 decided not to decide as to a regulatory approach to Native
25 American gaming. They had a full day hearing on November 14th,
26 1997 where they asked speakers to address relevant issues on
27 Native American Internet gaming. Unfortunately, there is no way
28 to make an administrative agency issue regulations if the
29 administrative agency does not want to do so.

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1 So the administrative agency that could be helpful to
2 us, apparently will not be.

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

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

22 The second issue I think that's very, very important
23 is why you should relax because as far as Native American gaming,
24 is because right now the Attorneys General of Missouri and
25 Wisconsin have filed litigation against the Coeur d'Alene and the
26 operators. The result always seems to be the same. They file in
27 State Court. It's removed to Federal Court. The Federal Judge
28 says the Coeur d'Alene are immune to litigation because of
29 sovereign immunity, but the Internet operator, in this case

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1 Unistar, may not be immune. If Unistar is not immune, then of
2 course, it's of no use to the Coeur d'Alene that they may be
3 immune. As Alan Kesner pointed out today, it's important to wait
4 until the United States Supreme Court decides an issue not
5 dealing with Internet gambling, but an analogous point dealing
6 with liability and sovereign immunity for tribal activity off the
7 reservation.

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

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

22 For example, one Attorney General decided he would
23 persuade Western Union not to transmit monies going between his
24 state and the West Indies. And he was successful at this. What
25 did the Internet companies in the West Indies do? They simply
26 used the word insurance in their address and all sorts of money
27 then went from that state to an Internet casino, where it entered
28 that sports book, quote, "insurance company." The only thing

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1 this did at first is it seemed to make Federal Express very, very
2 wealthy because it was used as a substitute for Western Union.

3 Thank you very much.

4 CHAIRMAN JAMES: Thank you, Mr. Kelly.

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