

The Rise of Internet Poker: What are the Legal Implications?

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The online poker industry is red hot. The game has never been more popular with American teens¹ and televised poker tournaments are commanding greater market share than ever. Revenues are rumored to have reached the billions, and online poker companies are going public. Yahoo! is rumored to be opening a poker site through its UK and Ireland division,² and even the State of North Dakota is considering legislation to legalize Internet poker, since it is a “game of skill.”³ So where do the poker chips fall, from a legal perspective?

Despite poker’s newfound popularity as the game of choice in cyberspace, the legal issues, from a United States perspective, remain as blurred and muddled as ever. Given a confusing set of legal decisions on applicability of the federal Wire Act to Internet gambling websites,⁴ players and webmasters are uncertain as to the status of their legal rights and obligations when it comes to enjoying this increasingly popular pastime.

Poker has traditionally been seen as a kinder, gentler, form of gambling. It is, however, questionable if poker is, in fact, “gambling” at all, under the traditional definition. Given the element of skill inherent in any game of poker, arguments can be made that traditional laws prohibiting “games of chance” do not apply. Although the Department of Justice may differ with

¹ K. Smith, “Hardly Child’s Play – Popularity of Poker Among American Teens Raises Concerns,” *iGamingNews.com* (January 26, 2005).

² Staff, “Yahoo! Rumored to be Planning Online Poker Room,” *iGamingNews.com* (February 24, 2005).

³ B. Vallerius, “Proposed Bill Could Lead to Legalized Internet Poker in North Dakota,” *iGamingNwes.com* (February 5, 2005).

⁴ Compare *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001) with *In re MasterCard International, Inc. Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D. La. 2001), *aff’d* 313 F.3d 257 (5th Cir. 2002).

this conclusion,⁵ poker should not be considered a “sporting event or other contest” within the proscription of the Wire Act.⁶

Each state regulates gambling activities in a slightly different way. However, the ability for any of the states to restrict or regulate transactions occurring in cyberspace is dubious, at best. The constitutional provision known as “the dormant commerce clause,” requires that such global transactions be regulated at the national, as opposed to state, level.⁷ Paradoxically, various federal gambling laws relate back to, and depend on, the definitions of “gambling activities” passed by the individual states.⁸ The United States Supreme Court has not weighed in on the issue of Internet gambling, let alone online poker rooms. Thus, the lower courts have been given little direction on the scope and applicability of existing legislation to this new form of entertainment. Poker players can take some comfort in the fact that the Wire Act was not intended to apply to casual betting activities, and has not been applied in that manner.⁹ Although numerous attempts have been made at the federal level to regulate the funding of online gambling transactions, the bills have been defeated each and every time.¹⁰

While Congress may choose to prohibit various forms of online gambling, or related services, poker should be the last form of online gaming that it seeks to regulate. The game enjoys a traditional position of popularity and endearment in American culture, dating back to the World War II generation. This is not a group of constituents that Congress generally likes to

⁵ Correspondence from John G. Malcolm, Deputy Asst. Attorney General, Criminal Division, United States Department of Justice (06.11.03). A copy of the letter can be viewed at http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf.

⁶ Title 18, U.S.C. § 1084.

⁷ See: *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.2d 737 (E.D. Mich. 1999); *PSINET, Inc. v. Chapman*, 167 F.Supp.2d 878 (W.D. VA 2001).

⁸ See: The Travel Act, Title 18, U.S.C. § 1952; The Wagering Paraphernalia Act, Title 18, U.S.C. § 1983; The Illegal Gambling Business Act, Title 18, U.S.C. § 1955.

⁹ See; *U.S. v. Baborian*, 528 F.Supp 324 (D.R.I. 1981), (The Wire Act does not apply to the social bettor; even those who bet large sums of money with great sophistication.)

¹⁰ E.g. The Unlawful Gambling Prohibition Act, submitted as: H.R. 474 (1998), H.R. 692 (1999), H.R. 3125 (2000), H.R. 556 (2002), H.R. 21 (2003), H.R. 1223 (2004).

alienate. Moreover, online poker can be separated out from other forms of gambling regulation by seizing upon the element of skill necessary to participate in this form of gaming. Traditional games of chance can be potentially regulated while carving out exceptions for online poker, should Congress decide to venture into these murky legislative waters.

Regardless how the executive or judicial branches decide to approach online gaming regulation, the game appears to be unstoppable in the court of public opinion. Legislators can choose to ignore the will of the public at their own peril. Historically, lawmakers have paid a substantial price at the ballot box when they try to restrict activities that enjoy wide popular support. Like in North Dakota, regulators throughout the United States may see the wisdom of experimenting in the legalization and regulation of some forms of Internet gambling; and poker seems to be the best place to start.

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