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TESTIMONY OF PATRICK FLEMING

on behalf of

THE POKER PLAYERS ALLIANCE

UNITED STATES SENATE COMMITTEE
on
INDIAN AFFAIRS

"OVERSIGHT HEARING on the U.S. Department of Justice Opinion on Internet Gaming: What's at Stake for Tribes"

February 9, 2012

Chairman Akaka and Members of the Committee, I am pleased to have this opportunity to testify before you today. I come here as an attorney and, more specifically, in my role as Litigation Support Director for the Poker Players Alliance (PPA), an organization of 1.2 million Americans who like to play a great American game of poker in both commercial and Tribal casinos, in their homes, in bars, in charitable games and on the Internet. They do so for recreation, for camaraderie, for intellectual challenge and stimulation, and some of them do it for a living.

To introduce myself briefly, I am an attorney from Portsmouth, New Hampshire and have been a member of the bar in New Hampshire since 1985. The primary focus of my legal practice has been criminal defense and that has always included a good familiarity with gambling law. I have also been a lover of competitive games since childhood, and I consider poker to be the quintessential competitive game of skill. I joined the PPA in 2007 and, through a process of recommendation and effort, helped create the PPA's Litigation Support Network in order to assist poker players with the many legal questions that surround their ability to play their favorite game. In 2008, I was named Director of the Network and since then have devoted significant time and effort, with the help of many other poker-playing lawyers, to fully understanding the nature and details of the Federal gambling laws and the gambling laws of the 50 States. It is my hope today that I can use some of that knowledge and experience to assist this Committee.

Let me begin by reiterating something that PPA's Chairman, former Senator Alfonse D'Amato said in this Committee's previous hearing on Internet gaming: the PPA supports a robust, competitive, regulated interstate market in which Tribal gaming interests are vital players.

Today, as I understand it, the Committee seeks to determine the ways in which the recent change in policy by the U.S. Department of Justice (DOJ) regarding the scope of the Wire Act may affect the future of Tribal gaming. The short answer is that this change in policy is likely to have far-reaching effects, few of which are certain at this time, but the many of which may place Tribal Gaming operators at significant disadvantages with respect to other gaming operators. The bottom line is that if Tribal gaming is going to continue to be a competitive operator in the gaming industry, it will most likely need the assistance of this Congress through the passage of new legislation in order to meet the future challenges.

In order to understand the basis for this conclusion, a brief outline of existing Federal and State law is in order.

There are eight Federal laws which concern gambling and gaming (I use both words because which games when played for money constitute gambling games is not consistent across the law): The Wire Act (18 U.S.C. § 1084), the Interstate Horseracing Act (IHA, 15 U.S.C. § 3002), the Professional and Amateur Sports Protection Act (PASPA, 28 U.S.C. § 3701), the Indian Gaming Regulatory Act (IGRA, 27 U.S.C. § 2701), The Travel Act (18 U.S.C. § 1952), the Illegal Gambling Business Act (18 U.S.C. § 1955), the Unlawful Internet Gambling Enforcement Act (UIGEA, 31 U.S.C. §§ 5361–5367), and the Lottery Acts (18 U.S.C. §§ 1301-1304).

Without going into too much detail regarding each, PASPA is not germane to the discussion as it is essentially a prohibition against additional States allowing sports betting. The IHA also need not be discussed at length as it merely codifies a mechanism for remote wagering on horse racing

and to the best of my knowledge there are no Tribal racing operations. And the Lottery Acts are clearly limited to physical transactions involving lottery tickets.

The Travel Act, the IGBA, and the UIGEA all create Federal criminal offenses for certain gambling activity, live or online. But none of these three laws independently identifies an act as an offense. Instead, each of these statutes require that any prosecution commenced pursuant to the statute also include, as an element of the offense, that the defendant has violated some other substantive gambling law. Under the UIGEA, it may be a Federal or State substantive gambling law; under the Travel Act and the IGBA, it must be a State substantive gambling law.

Thus the only Federal statute which independently creates a substantive Federal gambling offense, and therefore can act as an independent Federal prohibition on conduct, is the Wire Act.

Prior to December 23, 2011, there was a live dispute regarding the reach of the Wire Act's prohibition. Most legal scholars and two Federal courts (*In re* MasterCard Int'l Inc., 313 F.3d 257 (5th Cir. 2002)) interpreted the Wire Act to only be applicable to gambling that involved wagering on the outcomes of sporting events and sporting contests. The DOJ, however, consistently maintained that the Wire Act applied to all wagering activity otherwise conducted in the manner proscribed by the statute. Throughout the first 10 years of this century, the DOJ had asserted its position not only in the courts (U.S. v. Lombardo, 639 F. Supp. 2d 1271 (D. Utah 2007); but also, according to numerous press reports, when providing information to various State legislatures. In numerous reported instances, beginning with North Dakota in 2005[1] the DOJ was said to have informed State legislatures that State laws, which would have allowed non-sports wagering over the Internet, would violate the Wire Act and would therefore be pre-empted by Federal law.

Thus prior to 2011, no State acted to specifically allow and implement gambling or gaming activity over the Internet (other than, of course, wagering on horse racing pursuant to the IHA). Indeed, Nevada and the Virgin Islands had actually passed laws intending to allow Internet wagering, but neither fully implemented those laws in light of the Federal opposition.

In June of 2011, Nevada once again passed a law, Assembly Bill 258, allowing and implementing Internet wagering, though limited only to the game of poker. Yet even then, that Nevada law was subject to an explicit limitation that no actual operation would commence until it was deemed clearly legal under Federal law.

Also in 2011, the Lottery Commissions of two States, New York and Illinois, sought guidance from the DOJ on the issue of using the Internet as a means of selling lottery tickets within State borders. Another inquest was made by Senators Kyl and Reid, seeking a broad clarification of the Wire Act's parameters.

And on December 23, 2011, the DOJ responded to these inquiries. The letters publicly issued on that date not only answered questions, they announced a complete change in position. After reviewing its prior stance and acknowledging its previous insistence to the contrary, the new

[1] http://www.internetnews.com/busnews/article.php/3632206/North+Dakota+a+Gambling+Haven.htm

DOJ position is that the Wire Act, after all, really does only apply to gambling that is in the nature of wagering on sporting events. And although the DOJ opinion is not a court ruling with precedent-setting impact, if a prosecuting authority announces it believes certain conduct is not proscribed by a statute, one ought to at least expect that the same authority will not bring prosecutions based on that conduct.

Thus with that communication, the DOJ removed the sole Federal barrier that it had for years argued was a complete bar to internet wagering activity in the United States.

As a direct result, for any gambling, gaming or wagering activity conducted on the Internet to be currently illegal, it must be illegal under a valid State law.

Currently only nine States (Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Washington and Wisconsin) have statutes which expressly address wagering activity on the Internet (other than horse racing). In each of those States except Nevada, conducting as a business any wagering activity over the Internet is either expressly illegal or illegal except for horse race wagering. Nevada's recently passed law expressly allows for the game of poker to be conducted over the Internet by operators licensed in the State of Nevada. That Nevada law also allows its licensed operators to offer Internet poker to people located in other jurisdictions provided the law of the other jurisdiction does not make such activity illegal.

It should also be noted that New Jersey is seriously considering a law similar to Nevada's and that the New Jersey legislation is not limited to poker, but would also allow all the other casino games such as slot machines and blackjack to be offered in an online version.

It is impossible to state for certain what the law is for the 41 States that have no express provision regarding Internet wagering. All the statutes in these other States predate the internet, often by decades, and sometimes by centuries. A lawyer or court seeking an answer regarding internet wagering's legality must take the existing statute and try and apply it to this new situation. In some cases this may be easier than in others. For example, it would not be surprising to see a court rule that Maryland's statute (§ 12-102), which simply states that "A person may not: (1) bet, wager, or gamble", applies to all methods of wagering including those conducted over the internet. On the other hand, it is extremely difficult to infer legislative intent regarding Internet wagering when faced with a statute such as South Carolina's § 16-19-40: "Unlawful games and betting. If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice ...."

Another aspect of State law is that States define gambling and wagering in a number of different ways. For example, the game of poker is a "lottery" according to the Kansas Supreme Court (*State ex rel. Stephan v. Finney*, 867 P.2d 1034 (1994)), but its neighbor, the Missouri Supreme Court, has specifically declared the opposite (*Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 62 (Mo. 1994)). Similarly, different State courts may make different determinations even when using the same legal definitions. In most States, a game played for money is "gambling" if the outcome of the game is predominantly determined by chance rather than the skill of the players. The PPA, not surprisingly, considers poker to be a game where skill predominates, but

not all agree. Indeed, many games, such as backgammon, scrabble and poker, are games where the elements of chance and skill are significantly intertwined. It is very easy to see a future where scrabble and poker (played for money) are legal in State A, only scrabble in State B, and neither in State C.

The bottom line is that, with a few exceptions, current State law does not lend itself to easy answers when one poses a question regarding the legality of a specific Internet gaming activity. Usually the best that can be said is that the activity is clearly illegal in some States and maybe or maybe not illegal in others. It will be very interesting to see who, if anyone, will attempt to take advantage of these issues in current State law now that the Wire Act is limited to wagering on sporting events.

But far more important to the question at hand is the obvious fact that States can change their laws. And with the lack of any national Federal guideline other than the Wire Act's now limited prohibition on sports wagering, what that future State legislation may look like is limited only by imagination, and, possibly, the US Constitution's Commerce Clause, specifically the "dormant commerce clause" principle.

Regarding what can be imagined, there are already some real examples: Nevada's passage of online poker legislation and New Jersey's contemplation of passing legislation allowing all casino games to be conducted online. Other proposals have been made and are being considered in State legislatures throughout the country. Among the many proposals, all vary as to what specific games will be allowed, the circumstances under which they will be allowed, and as to what entity or entities will get to operate the online games.

Trying to list all the various possible legal online gaming schemes States may choose from is a herculean task, but thankfully not necessary to address this committee's concerns. There are really only two questions that matter with respect to future State online gambling laws and Tribal gaming interests. Those are, what games will be allowed and will Tribal gaming operations be able to compete in the offering of those games.

With respect to which games will States choose to authorize, the basic distinction is already provided in law and practice. The IGRA already distinguishes between class 2 games (bingo and card games where the players compete against each other such as poker) and class 3 games (all other gambling games including traditional casino games like slot machines, blackjack, and roulette). Similarly, the distinction most often discussed among State legislatures is between allowing online poker alone (as in Nevada) or allowing all casino games online (as contemplated by New Jersey).

With respect to allowing operators there is again a dichotomy, this time between open markets and closed markets. Nevada's new law is an open market, allowing anyone to operate an online poker site so long as they are able to obtain a license. But many State lottery operators are suggesting that a closed market be created along the same design as that of the State lotteries: one State operator. And at least one State, California, has considered adopting a monopoly model that would allow only a set number of licensed operators.

With these distinctions in mind, it is then possible to chart the ramifications on Tribal gaming of the various possible new State online gambling laws.

First, it is clear that there will be far less impact on Tribal gaming operators if new State gambling laws are limited to games such as poker (and any other card game meeting IGRA's "class 2" definition). According to the 2010 Spectrum Study prepared for the National Indian Gaming Association, Tribal poker operations account for only 1% of Tribal gaming revenue and thus any change in this market is not likely to have profound effects on Tribal gaming operations.

Additionally, all the preliminary evidence strongly suggests that there is a healthy relationship between online poker and live poker. Poker is, at its core, a social game of person against person. Hence poker players as a general rule enjoy both settings and use one to compliment the other. While there are some poker players who prefer live games and some who prefer online games, the majority play both with equal enthusiasm. Since online poker can be offered at stakes far below the minimum needed to make a profit from live games, most poker players use the online game as means of quick entertainment and/or practice. Then, when looking for a long evening's entertainment or after having accumulated enough winnings and experience to try higher stakes, they go to a live game.

With respect to other casino games, the opposite of the first point is clear and the opposite of the second point is highly likely. Slot machines and table games account for the majority of Tribal gaming revenue, so anything that will affect these games may have significant effect.

And it seems, again from preliminary study, that those who play games "against the house" do not really care that much about the nature of their "house" opponents. While some may still see the casino as a special place to go, most simply want to play the games and may well see the ease of play at home as a good reason not to go elsewhere to play the same game.

One final point should also be made with respect to the distinction between class 2 social games and class 3 casino games. It is well known that class 2 gaming on the Internet requires a larger body of available players to satisfy customer demands and thus be a profitable operation; the need for active opponents to run the game dictates the need for a large player pool from which an active player pool can be guaranteed to always be present. States with small populations, and so Tribal gaming interests in those same States, will therefore need to arrange for cross-border class 2 games. There is nothing in current Federal law to currently prevent this from happening, but there is also no framework in which to make it happen. It remains to be seen whether smaller States interested in allowing class 2 games will be able to come to terms with each other on issues such as regulation, consumer protection and taxation and so allow cross-border games. It is equally speculative as to whether these States will decide to include Tribal interests in such interstate compacts.

Regarding the question of being allowed to participate in the market, at first glance it would appear Tribal gaming must be allowed into the market under the provisions of the IGRA. Those provisions, however, may well be outdated in the Internet age. Section 2710 of the IGRA guarantees the Tribes the right to offer games as they are allowed by the State in which the Tribal

lands are located. Unfortunately, the specific wording of that section only allows the Tribes to offer those games "on Tribal land." And "Tribal land" is specifically defined in 27 U.S.C. 2703.4 as the confines of the reservation or similarly owned and governed land.

Although the current status of Federal law is still emerging in this area, the cases that have tackled the issue so far would suggest that a Tribal online gaming operation that allowed players to access the site from outside the reservation would be found to be operating, at least partially, other than "on Tribal land." Although a very different context, when offshore sports betting operator Jay Cohen was arrested for violating the Wire Act by accepting sports bets from New York made through the Internet to his business in Aruba, he made the argument in court that the betting took place in Aruba and so there was no jurisdiction for the U.S. to prosecute him. Both the trial court and the 2nd Circuit Court of Appeals disagreed (U. S. v. Cohen, 260 F.3d 68, 76 (2nd Cir. 2001)). This would strongly suggest that a Tribal online gaming operation which accepts play from people not on Indian land is not operating "on Indian land" just because that is where the games are run.

There thus seems the real possibility that despite its stated purposes and intentions, the IGRA does not, as currently written, guarantee the Tribes the same online gaming rights as the States now have. In short, the likely result of the DOJ's new position on the Wire Act will be this: each jurisdiction will determine who, if anyone, can take play from individuals located in that jurisdiction. If Tribal gaming enterprises in that jurisdiction wanted to take Internet bets from people on Indian land, they would be entitled to do so per the IGRA. But if those same Tribal gaming enterprises wanted to take Internet bets from people outside their reservations, they would have to seek licenses and/or other direct permission from the States in which those players are located.

Additionally, many States are discussing allowing their State lottery operations to also conduct games on the Internet. A law allowing this was passed right here in Washington, D.C., but was also recently repealed. The majority of these proposals envision the lottery having a monopoly on other Internet games similar to the current monopoly they have with respect to lotteries. This sort of law seems especially dangerous for Tribal gaming operations, especially when one considers the possibility of instant lotteries or the online equivalent of lottery scratch tickets. An Internet version of either of these games, while technically not a "slot machine" game, would nonetheless, be virtually indistinguishable from an online slot and so, as noted before, would compete directly with the main revenue generator for Tribal gaming.

Lastly on this point, some States are considering a closed in-State gaming market with participation being limited to a few specific operators. In some cases, the limited operators may include Tribal gaming operators. At first blush this may seem protective of Tribal interests, but it also may be a false protection. The Commerce Clause of the US Constitution (Article I, Section 8, Clause 3) has been interpreted to require that unless Congress specifies otherwise (and it has not in this situation), State law may not unfairly discriminate against out-of-State commerce. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) ("... the Court's Commerce Clause decisions dealt ... almost entirely with the Commerce Clause as a limit on State legislation that discriminated against interstate commerce."). It is therefore a reasonable proposition that once a State allows a form of internet gambling to be conducted within its borders by private entities, it

cannot then prevent out of State interests from seeking to participate in that same form of commercial activity. Some have suggested that a State's traditional police power over gambling may give States extra rights in this context, but there is as yet no case law to support this argument. At best, it would appear that while States maintain the right to either allow or prohibit gambling within its borders, once it chooses to allow such activity, it cannot significantly discriminate against out-of-State interests in favor of in-State interests. Illustrative of this point is the case of Rousso v. Washington (239 P.3d 1084 (2010)) in which the Washington Supreme Court rejected a Dormant Commerce Clause argument that sought to overturn Washington's ban on Internet gambling. That Court accepted that the Dormant Commerce Clause applied to the situation, but rejected the argument based on the finding that Internet gambling and live gambling (which Washington allows) were different areas of commerce and both in-State and out-of-State interests where equally barred from the Internet market.

Accordingly, while it may seem tempting to establish an intrastate monopoly as a way to protect in-State interests (perhaps including Tribal interests), given the undeniable interstate nature of the Internet, that protection may be just as fleeting as the attempt by New York to grant a steamboat monopoly to Robert Fulton on New York waterways (Gibbons v. Ogden, 22 U.S. 1 (1824)).

Finally, there is the question of the practical ability of Tribal gaming interests to compete with the larger and more broadly established corporate gaming interests. I am far from an expert in this field, but it appears to be common sense that at least the smaller, less capitalized Tribal gaming operators would have significant disadvantages when trying to compete nationally, or even in-State, with well-financed commercial casino operations. There are, however, ways to participate in certain online gaming markets that do not require direct competition, but instead foster cooperation that benefits all.

I have remarked above on the fact that players of Class 2 social games are more likely to use Internet play as a means to supplement and support live play than players of Class 3 house-banked games. This aspect of social games supports the prospect of direct interaction between live game operators and Internet game operators. It is a well-known fact that social games are not a major source of casino or Tribal gaming revenue and that higher profits are made from the house-banked games. But social games have the additional effect of bringing people into a casino who otherwise would not visit. And, of course, it is well-known in the gaming industry that getting customers through the door is the key to a successful operation. In this context, it is easy to see a correlation between online social gaming operations and local live operations. A website for online poker linked to a local venue is likely to generate additional live business for the local venue, both through increased interest in the game and through the offering of promotions redeemable at the local venue. With respect to social games such as poker, the efficacy of "affiliates" as marketing portals is well established. Affiliates are simple websites through which a player is connected to the larger website that actually provides the games. Typically affiliates earn a percentage of the money earned from the player who participates through them and, probably more importantly, the affiliate establishes the personal relationship with the player. So at least with respect to social games, the ability of small regional operations to participate and benefit as affiliates to larger operations is clearly established. Indeed, Tribal interests may well have an advantage in setting up these kinds of affiliate relationships as they

are typically located in areas otherwise without alternative live venues. A poker player in Arizona may well prefer that his status as a customer is rewarded by promotions available at his local tribal casino rather than the casino in Las Vegas that he may only visit once or twice a year.

In conclusion, the basic answer to the Committee's question is clear: the DOJ's new position that the Wire Act does not apply to gaming other than wagering on sporting events will have large and significant ramifications for Tribal gaming interests. Depending on future developments in State laws, those ramifications will present Tribal gaming operators with significant competition issues that current law leaves them woefully unprepared to meet. The actual effects will depend upon the decisions made by the various States with respect to future laws regarding Internet gambling and on whether the Federal government acts to establish a new national policy with respect to Internet gambling.

For Tribal gaming interests specifically, I believe there are three essential issues that must be addressed: 1) whether the IGRA must be updated to clearly allow Tribal interests the same gaming rights on the Internet as States allow themselves or private companies, 2) whether it would better protect Tribal interests by adoption of new Federal legislation that allows only class 2 social games like poker to be conducted over the Internet, and 3) whether Tribal interests should also be protected by Federal legislation that ensures unfettered interstate competition, but in a manner that directly allows and supports participation by local interests.

I thank you, and am available for any questions.