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FROM THE WIRE ACT TO WIRELESS: A BRIEF OVERVIEW OF THE HISTORY OF ONLINE GAMBLING IN THE UNITED STATES

Introduction

When Resorts International opened a casino on the Atlantic City boardwalk on May 26, 1978, it was a momentous occasion that would forever change the course of gambling history in the United States. At the time, it marked the first legal casino operation in the United States outside of Nevada. The decades following the adoption of the Federal Indian Gaming Regulatory Act in 1988¹ saw many states and tribal jurisdictions jumping on the bandwagon and legalizing retail casino operations. As of December 31, 2022, the American Gaming Association estimates that there are approximately 1,000 commercial and tribal casinos in the United States operating in 45 states.²

Of course, today, gambling no longer is limited to just brick-and-mortar buildings and physical slot machines and table games. Virtually any computer and smart device is a full-fledged casino, possibly a sports book

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1. 25 U.S.C. § 2701 *et seq.* (1988).

2. See *generally State of Play 2023*, American Gaming Association, available at <https://www.americangaming.org/state-of-play-2023/>. The only states with no retail commercial or Indian gaming casino operations are Georgia, Hawaii, South Carolina, Utah, and Vermont, along with the District of Columbia.

and race book as well, depending on the jurisdiction. While the federal government has passed some laws impacting gambling, the regulation of gambling has traditionally been left to the states pursuant to the Tenth Amendment of the United States Constitution. This has resulted in a patchwork of state laws and regulations that vary widely. Moreover, states are free to completely prohibit all forms of gambling, as Hawaii and Utah have done.³ At the time of the writing of this article, online casino gambling, including poker, is legal in six states.⁴ Sports wagering, both online and retail, is legal in 38 states plus the District of Columbia.⁵

This article will provide a brief overview of the history and evolution of online gambling in the United States. It will highlight certain important milestones and events that brought the gambling industry in the United States to where it is today. Finally, this article will provide an overview of the current status of legal online wagering in the United States.

The Wire Act

Historical Background

The origins of modern online gambling regulation and operations in the United States traces back to the pre-internet era and the anti-organized crime efforts of President John F. Kennedy and United States Attorney General Robert F. Kennedy.⁶ As part of that effort, the Wire Act⁷ was enacted in 1961 as part of a package of related federal laws that sought to assist states in combating organized crime by cutting off the financial resources obtained

3. See Victoria Beecroft, *Don't Gamble with Aloha*, Marriott Student Review Vol. 2, Iss. 3, Article 10 (2019), available at :

<https://scholarsarchive.byu.edu/marriottstudentreview/vol2/iss3/10>.

4. See Matthew Kredell, *State-By-State 2024 Online Gambling Legislation Projections*, PlayUSA (January 8, 2024, updated January 9, 2024), available at <https://www.playusa.com/2024-gambling-expansion-preview/>. In addition, Nevada has online poker and Rhode Island is expected to launch online casino in 2024.

5. See *Interactive U.S. Map: Sports Betting*, American Gaming Association, available at

<https://www.americangaming.org/research/state-gaming-map/>. Of those, 29 states plus the District of Columbia offer online sports wagering. North Carolina is expected to launch online sports wagering in 2024. Three states, Tennessee, Vermont, and Wyoming, offer only online sports wagering with no corresponding retail operations.

6. See Jordan Hollander, *The House Always Wins: The World Trade Organization, Online Gambling, and State Sovereignty*, 12 Rutgers J.L. & Pub. Pol'y 179, 184 (2015).

7. 18 U.S.C. § 1084 (1961).

through illegal wagering activity.⁸ The Wire Act reads, in its entirety, as follows:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by

8. Some of these other federal laws include the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955 (2014), the Travel Act, 18 U.S.C. § 1952 (2014), and the Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2014). IGBA is designed to assist states enforce their own anti-gambling laws and requires a state law violation as a predicate to prosecution. The Travel Act generally prohibits travel or the use of any facility in interstate or foreign commerce to promote, manage, further, or carry on any business enterprise involving illegal gambling or other illegal activity. Like IGBA, the Travel Act generally requires as a predicate a violation of state anti-gambling laws or other federal law. The Wagering Paraphernalia Act prohibits the transportation in interstate commerce of anything used for illegal gambling and requires a violation of state law. The Wire Act, by contrast, does not require a state law violation as a predicate.

law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.⁹

The Wire Act is a supply-side law, meaning that in order to violate its terms one must be engaged in the "business of betting or wagering." This has been held to require the sale of a product or service for a fee involving third parties or the performance of a function which is an integral part of such business.¹⁰ Furthermore, the conduct need not be exclusively engaged in by the business, but must be an integral part.¹¹ The court in *Baborian* held that "mere bettors" are not covered by the Wire Act.¹² The actor must knowingly use a wire communication facility, which has been commonly interpreted broadly to apply to the internet. The actor need not know the wire communication facility crosses state or international boundaries, but simply must knowingly use the facility. Lastly, the actor must transmit, in interstate or foreign commerce, (i) a bet or wager, (ii) information assisting in the placement of a bet or wager, and/or (iii) a communication that entitles the recipient to receive money or credit as a result of a bet or wager. There are two exemptions in the Wire Act. The first exempts the transmission of information related to sports for news reporting. The second exempts the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal. It should be noted, however, that this second exemption only applies to information assisting in the placement of a bet or wager (such as line information) and not to the bet itself or information entitling the recipient to money or credit as a result of a bet or wager.

The Cohen Case

In the late 1990's, there was a significant Wire Act prosecution against Jay Cohen, an American bookmaker who resided in Antigua and operated an offshore sports book known as World Sports Exchange, which targeted customers in the United States, and in particular, New York.¹³ Customers were required to first establish an account and wire money into that account in Antigua.¹⁴ Bets were then placed either by telephone or online. While such betting activity was legal in Antigua, it was not legal in the United States, and

9. 18 U.S.C. § 1084.

10. *United States v. Baborian*, 528 F.Supp. 324, 329 (D.R.I. 1981).

11. *Ibid.*

12. *Id.* at 331.

13. *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

14. *Id.* at 70.

importantly for this case, in New York. Cohen was arrested in 1998, charged with violating the Wire Act, and was convicted at trial.¹⁵

On appeal, Cohen advanced several arguments to overturn his conviction, including that this offshore bookmaking activity was protected under the safe-harbor provision of the Wire Act. Cohen argued that the betting activity was legal, or not expressly prohibited, in both Antigua and New York and that the transmission of information over the telephone or internet was limited to mere information that assisted in the placing of bets in a jurisdiction where such wagering was legal, and not the bets themselves.¹⁶ The court rejected both arguments. Even though the betting was legal in Antigua, it was illegal in New York, thus rendering the safe-harbor provision of the Wire Act inapplicable.¹⁷ Since World Sports Exchange used an account wagering system, Cohen maintained that the information conveyed by the phone or online was merely information assisting in the placement of a bet or wager, and not the bet itself since the information was used to place a bet using the patron's established account in Antigua. The court held that by World Sports Exchange taking requests and accepting them as bets, the customers were placing bets.¹⁸

The *Cohen* case had an enormous impact on the local economy in Antigua, which had developed into a center for offshore gaming. The remote gaming industry at the time was worth over \$3.4 billion to the Antiguan economy and had employed over 4,000 people, which was reduced to only a few hundred people by the early 2010's.¹⁹ Motivated by the *Cohen* case, Antigua in 2003 filed a complaint against the United States before the World Trade Organization (WTO), arguing that certain American laws restricting cross-border gambling and betting services conflicted with the United States' commitments under Article I of the General Agreement on Trade in Services (GATS).²⁰ A panel tribunal found that the Wire Act, the Travel Act, IGBA, and laws of the states of Louisiana, Massachusetts, South Dakota, and Utah all violated the United States' commitments under the GATS. On appeal, the Appellate Body of the WTO reversed the findings of the panel tribunal related to the state laws, not because the Appellate Body did not believe that it had the authority to review and invalidate state laws, but because it found Antigua did not make a *prima facie* case. However, the Appellate Body did find that the federal Interstate Horse Racing Act discriminates against foreign and

15. *Id.* at 71.

16. *Id.* at 73.

17. *Id.* at 74.

18. *Id.* at 75.

19. Government of Antigua & Barbuda, *Antigua to Pursue Sanctions Against the United States in Decade-Long Trade Dispute*, PR Newswire (January 28, 2013), available at

<https://www.prnewswire.com/news-releases/antigua-to-pursue-sanctions-against-the-united-states-in-decade-long-trade-dispute-188646561.html>.

20. Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (October 11, 2004).

domestic supplies and could not be justified under any exemption.²¹ The WTO essentially gave the United States the option to prohibit all online horse race wagering or permit foreign operators. The United States has essentially ignored the WTO's decision, and the WTO has permitted Antigua to levy trade sanctions against the United States.²²

The DOJ Memo

Prior to December 2011, the Criminal Division of the United States Department of Justice (DOJ) had taken the position that the prohibitions of the Wire Act applied to all forms of betting or wagering, and not just to sports wagering. Federal courts that had considered the issue were split.²³ In response to an inquiry from the Criminal Division of the DOJ to proposals by New York and Illinois to sell lottery tickets online, the DOJ Office of Legal Counsel released a memo (2011 DOJ Memo) in December 2011 clarifying the federal government's position on this issue.²⁴ The Office of Legal Counsel was asked to decide whether the Wire Act prohibits states from offering in-state sales of lottery tickets online if the transmission of electronic data during the sale crossed state lines. The Office of Legal Counsel concluded that the Wire Act's prohibitions "relate solely to sports-related gambling activities in interstate and foreign commerce." Importantly, Office of Legal Counsel memoranda are merely guidance and do not carry the force of law.

Even though the request that preceded the 2011 DOJ Memo was ostensibly about offering lottery ticket sales online, several states seized the opportunity to legalize online casino gambling within their respective jurisdictions. Prior to the issuance of the 2011 DOJ Memo, Nevada had

21. 15 U.S.C. § 3001 *et seq.* (2000). The Interstate Horse Racing Act (IHA) was passed in 1978 to encourage cooperation between states that permit off-track wagering on horse racing. It is an opt-in statute, meaning that states are free to choose to participate, again demonstrating Congress' intent not to displace state authority over gambling regulation. In 2000, Congress amended the IHA to permit remote wagers across state lines by phone or on the computer so long as the bet is legal in the states where the bettor is located, where the bet is accepted, and where the race takes place. *See also* I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, UNLV Gaming Research & Review Journal, Vol. 10, Issue 1 (2006), available at <https://digitalscholarship.unlv.edu/grrj/vol10/iss1/1/>.

22. For a further discussion of the WTO dispute, *see* Hollander, *supra* note 7.

23. *Cf. In re Mastercard Int'l, Inc., Internet Gambling Litig.* 132 F.Supp. 2d 468,480 (E.D. La.2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002) (holding that the Wire Act only applied to sports wagering) and *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (taking opposite view).

24. The full memo from the Office of Legal Counsel may be accessed at <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

enacted a statute permitting the issuance of licenses for online casinos, but after the DOJ threatened to prosecute any online casino operator, none were issued.²⁵ Following the 2011 DOJ Memo however, Nevada re-enacted that authorization.²⁶ Delaware enacted legislation authorizing online casino gambling, poker, and video lottery games in 2012, which launched in 2013.²⁷ New Jersey adopted its online gambling law on February 26, 2013, including poker, and launched operations in November 2013.²⁸

In 2014, Delaware and Nevada entered into a multi-state internet gaming agreement, which permits online poker players in each state to play against each other even though they are not located in the same state.²⁹ By entering into such an agreement, the pool of possible players and liquidity, particularly with these two smaller states, increases and makes the available games more attractive to potential gamblers.³⁰ Since that time, New Jersey, Michigan, and West Virginia have joined this interstate poker compact, further increasing the liquidity of the poker market.³¹

The regulated online casino markets in those jurisdictions that legalized such activity continued to prosper following the 2011 DOJ Memo. The federal government under a new presidential administration in 2018, however, requested the Office of Legal Counsel to reconsider the 2011 DOJ Memo. This resulted in a new memorandum that concluded that the Wire Act *did* apply to non-sports wagering, thus reversing the 2011 DOJ Memo.³² This memorandum called into question not only the intrastate online sales of lottery tickets but also other types of intrastate online gambling that states had authorized in reliance on the Office of Legal Counsel's earlier opinion. Following this reversal of position, the New Hampshire Lottery Commission and a lottery supplier brought a lawsuit challenging the Office of Legal

25. I. Nelson Rose, *The DOJ Gives States a Gift*, 4 UNLV Gaming L.J. 1, 6 (2013), available at <https://scholars.law.unlv.edu/glj/vol4/iss1/2>.

26. Nev. Rev. Stat. Ann. § 463.745 (2013). While the statute permits both internet casino and poker, only online poker operations have commenced in Nevada.

27. 29 Del. C. § 4801 *et seq.* (2012).

28. N.J. Stat. Ann. § 5:12-95.17 *et seq.* (2014).

29. Anthony N. Cabot and Keith C. Miller, *The Law of Gambling and Regulated Gaming: Cases and Materials Second Edition*, Carolina Academic Press (2016), 513

30. *Id.* at 514.

31. Robert Simmons, *West Virginia Joins Online Poker Shared Liquidity Agreement*, EGR (November 15, 2023), available at <https://www.egr.global/northamerica/news/west-virginia-joins-online-poker-shared-liquidity-agreement/>. As of the date of this writing, only Pennsylvania and Connecticut have legalized online poker but are not members of the interstate compact and thus do not share in the pooled liquidity.

32. The 2018 DOJ memo is available at <https://www.justice.gov/olc/file/1121531/download>.

Counsel's new interpretation seeking a declaratory judgment that the Wire Act only applied to sports wagering. A federal district court agreed with the plaintiffs, holding that the 2011 DOJ Memo's interpretation that the Wire Act applied only to sports wagering was the correct one and set aside the 2018 re-interpretation.³³ In 2021, the United States Court of Appeals for the First Circuit affirmed that decision.³⁴

UIGEA and Black Friday

UIGEA

Against the backdrop of the debate over the Wire Act and the rising popularity of poker, including unregulated online poker, the Federal government in 2006 enacted the Unlawful Internet Gambling Enforcement Act (UIGEA) in an effort to crack down on illegal online gambling.³⁵ Passed as part of an unrelated national security bill regarding port safety, UIGEA has been widely misunderstood and criticized. Unlike prior federal legislation related to gambling, UIGEA was not geared towards fighting organized crime. Instead, UIGEA is a payment processing law which prohibits the processing of financial transactions related to "unlawful internet gambling" as defined in the law. Essentially, UIGEA makes it a crime for payment processors to accept money related to online gambling that violates any other state or federal law. Importantly, UIGEA has a significant, and seemingly often overlooked or misunderstood limiting construction. UIGEA does not make any gambling activity illegal that was previously legal and does not make any gambling activity legal that was previously illegal.³⁶ The determination of legality under UIGEA is left to other applicable federal and state laws regarding gambling.³⁷

33. *New Hampshire Lottery Commission v. Barr*, 386 F. Supp. 3d 132 (D.N.H. June 3, 2019).

34. *New Hampshire Lottery Commission v. Rosen*, 986 F.3d 38 (1st Cir. January 20, 2021).

35. 31 U.S.C. § 5361 *et seq.* (2006). Wagers placed pursuant to the IHA are expressly excepted under UIGEA.

36. 31 U.S.C. § 5361(b) (2006).

37. UIGEA contains a carve out for fantasy sports contests that both meet the definition set forth in the statute and that are also legal under other federal or state laws. There has been much controversy over the fantasy sports "exception" in UIGEA, with some daily fantasy sports operators, which differ significantly from traditional season-long fantasy sports contests, arguing that UIGEA affirmatively legalizes or authorizes such activity. This article will not cover this ongoing debate, which also involves the application of many different state law tests for what constitutes gambling. What should be emphasized, however, is that UIGEA is clear on its face that it does not make legal or prohibit any gambling activity. That is left to other applicable state and federal laws. UIGEA is a payment processing law and does not directly regulate gambling. For a more complete discussion on this topic, *see*

This is a recognition of the fact that the regulation of gambling is traditionally a police power reserved to the states pursuant to the Tenth Amendment of the United States Constitution.

One unique aspect of UIGEA is a provision that addresses intermediate routing of data over the internet. Due to the nature of how data is transmitted over the internet, an otherwise wholly intrastate transmission of data over the internet from a computer located in one state to a server located in that same state may cross a number of state and international boundaries. UIGEA, however, essentially overlooks any intermediate routing of electronic data, deeming that it “shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”³⁸ This poses a conflict with the Wire Act, however, where even an incidental crossing of state or international boundaries could result in criminal penalties.³⁹ This issue was sidestepped in the 2011 DOJ Memo as it relates to online casino gambling since it was determined that the Wire Act only reached sports wagering, but could still pose a conflict as it relates to sports wagering, which at the time was still mostly prohibited in the United States outside of Nevada.

Black Friday

On April 15, 2011, federal prosecutors from the United States Attorney’s Office for the Southern District of New York (SDNY) unsealed indictments against 11 defendants, including the founders of the three largest internet poker companies then doing business in the United States: PokerStars, Full Tilt Poker, and Absolute Poker.⁴⁰ The indictments alleged counts of bank fraud, money laundering, and gambling offenses, including violations of UIGEA. It was alleged that these poker companies used fraudulent methods

John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, *Journal of Legal Aspects of Sport* 97 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135384 and see Dustin Gouker, *Stop Saying UIGEA Makes Real-Money Fantasy Sports Legal*, *The Closing Line* (September 19, 2023), available at <https://closingline.substack.com/p/uigea-and-fantasy-sports>.

38. 31 U.S.C. § 5362(10)(E) (2006).

39. *United States v. Yaquinta*, 204 F. Supp. 276 (N.D. W. Va. 1962). In *Yaquinta*, a telephone wire originated in one part of West Virginia and terminated in another part of West Virginia, but physically crossed over the border with Ohio. A federal district court held that this was enough “to hang a hat” on federal jurisdiction to prosecute a Wire Act violation.

40. See *Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds*, Federal Bureau of Investigation (April 15, 2011), available at <https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds>.

to trick payment processors to continue processing transactions on their behalf by disguising the true nature of the transactions by labeling them as merchandise purchases of jewelry and golf balls. These indictments rocked the online gambling industry and “effectively halted the growth of the lucrative online poker industry in the United States.”⁴¹ The Black Friday indictments notably did not involve the Wire Act.

Eventually, all three operators charged on Black Friday settled their cases with the SDNY.⁴² Full Tilt Poker agreed to forfeit virtually all of its assets, including internet domain names, to the United States. PokerStars agreed to forfeit \$547 million to the federal government and reimburse \$184 million owed by Full Tilt Poker to foreign players. PokerStars also acquired all the forfeited Full Tilt Poker assets from the federal government.⁴³ Many of the company principals, who were also charged in related cases, were prohibited from serving in any management or director roles in any internet poker companies and PokerStars was prohibited from offering online poker in the United States for real money unless and until such activity was legal under United States law. Absolute Poker was required to forfeit all of its assets to the federal government.⁴⁴ While none of the companies admitted to any criminal wrongdoing or guilt in these settlement agreements, the impact and messaging of the Black Friday indictments were clear and the online poker industry in the United States essentially ceased until states such as Nevada, New Jersey, and Delaware later affirmatively legalized such wagering activity.⁴⁵

41. See Holden, *supra* note 38, at 108, n. 73.

42. See Manhattan U.S. Attorney Announces \$731 Million Settlement of Money Laundering and Forfeiture Complaint with PokerStars and Full Tilt Poker, Federal Bureau of Investigation (July 31, 2012), available at <https://archives.fbi.gov/archives/newyork/press-releases/2012/manhattan-u.s.-attorney-announces-731-million-settlement-of-money-laundering-and-forfeiture-complaint-with-pokerstars-and-full-tilt-poker>.

43. Nathan Vardi, *Amaya Gaming in Deal to Buy PokerStars for \$4.9 Billion*, Forbes (June 12, 2014), available at <https://www.forbes.com/sites/nathanvardi/2014/06/12/amaya-gaming-in-deal-to-buy-pokerstars-for-4-9-billion/?sh=705f98d44469>. PokerStars eventually was sold to a Canadian gambling supplier, Amaya Gaming, in 2014 for \$4.9 billion.

44. See note 43, *supra*.

45. See notes 26-29, *supra*. PokerStars currently operates in New Jersey, Pennsylvania, and Michigan, offering both online poker and online casino wagering. See News Direct, *Is PokerStars Legal in the US?* Yahoo! Finance (November 26, 2023), available at <https://finance.yahoo.com/news/pokerstars-legal-us-070000941.html>.

The Rise and Fall of PASPA

The Professional and Amateur Sports Protection Act

While much of the focus of this article so far has been on online casino and poker, the recent growth and expansion of sports wagering, including online sports wagering, cannot be ignored. As noted, most gaming law regulation and oversight is left to the various states pursuant to the Tenth Amendment of the United States Constitution. Where the federal government has acted in the gambling space, its efforts have largely been to assist the states in enforcing their own criminal laws and have concentrated on combating organized crime. One major exception to this general rule was the Professional and Amateur Sports Protection Act, more commonly known as PASPA.⁴⁶ Enacted in 1992 and signed into law by President George H.W. Bush, PASPA was meant to address concerns over the influence of gambling on minors and the protection of the integrity and fairness of athletic competitions.⁴⁷

PASPA was a unique federal law in the way it operated, which would eventually be the cause of its demise. PASPA did not directly prohibit or regulate sports wagering in the United States. Rather, PASPA made it unlawful for any “governmental entity...or person to sponsor, operate, advertise, or promote...a lottery, sweepstakes, or other betting, gambling, or wagering scheme based...on one or more competitive games” in which amateur or professional athletes compete or intend to participate.⁴⁸ Strangely, PASPA delegated enforcement of the law to the various private sports leagues whose competitions were the subject of the wagering schemes, along with the Attorney General of the United States, to commence an action in federal court to enjoin any potential violation of the law.⁴⁹

PASPA contained a number of exemptions, which permitted already existing sports wagering schemes legal under state law to continue.⁵⁰ This permitted full sports wagering operations in Nevada, and more limited sports wagering operations as they then-existed in Oregon, Montana, and Delaware, to continue to operate.⁵¹ PASPA also had another provision that permitted any other jurisdiction that had permitted casinos to operate in a municipality

46. 28 U.S.C. § 3702 *et seq.* (1992).

47. S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3555-56.

48. 28 U.S.C. § 3702 (1992).

49. 28 U.S.C. § 3703 (1992).

50. 28 U.S.C. § 3704 (1992).

51. See Jordan Hollander, *New Jersey and Sports Gambling: Perfect Together? A Look at Two Challenges to the Professional and Amateur Sports Protection Act and New Jersey's Effort to Implement Sports Gambling*, *Gaming Law Review and Economic* Vol. 18, Number 8, 799, 80 (2014), available at <https://www.liebertpub.com/doi/10.1089/glre.2014.1884>.

for the previous 10 years to opt-in and permit sports wagering within a year of PASPA's enactment.⁵² In effect, this provision could only apply to the State of New Jersey which, at that time was the only state that had offered commercial casino gaming for at least 10 years outside of Nevada. For various reasons, New Jersey did not opt-in during this one-year period.⁵³ A later legal effort by the various Atlantic City casinos to attempt to recognize sports wagering under then-existing law was unsuccessful.⁵⁴

From before the time it was enacted, there were federalism and constitutional concerns over PASPA. In a letter written by then United States Assistant Attorney General W. Lee Rawls in 1991, the DOJ asserted that the manner in which states determine to raise revenues had typically been left to the states and PASPA's indirect prohibitions on states raised federalism concerns.⁵⁵ Over the years, there were a handful of challenges to the restrictions contained in PASPA. Delaware, restricted to offering only three-leg parlay bets on National Football League (NFL) games, sought to expand the types of wagers offered, including single game betting, on various sports leagues, not just the NFL. In July 2009, various professional and amateur sports leagues sued Delaware because the new forms of betting to be offered would differ from the exemption granted to Delaware under PASPA.⁵⁶ The federal district court in Delaware declined to issue an injunction, but on appeal, the United States Circuit Court of Appeals for the Third Circuit vacated the district court opinion and held that the exemption in PASPA limited Delaware to only the sport wagering operations that existed at the time PASPA was enacted.⁵⁷ Notably, this challenge to PASPA did not involve its constitutionality, merely the extent of the bounds of the exemptions in the law.

The Fall of PASPA

The challenge to PASPA that would ultimately lead to its downfall started in November 2011, when the voters of New Jersey approved a constitutional amendment to the state constitution to permit state lawmakers to authorize sports wagering in the state.⁵⁸ Of course, such an

52. 28 U.S.C. § 3704(a)(3) (1992).

53. See Hollander, *supra* note 52, at 804.

54. IMO *Petition of Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test*, 269 N.J. Super. 469 (App. Div.), *aff'd*, 138 N.J. 1 (1993).

55. See Hollander, *supra* note 52, at 808, n. 97. See also Daniel Boswell, *The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting*, 28 U. Miami Bus. L. Rev. 115, 118 (2019), available at <https://repository.law.miami.edu/umblr/vol28/iss1/5>.

56. *Office of Comm'r of Baseball v. Markell*, 2009 WL 2450284 (D.Del. Aug. 10, 2009).

57. *OFC Comm'r Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

58. Prior to the approval of the state constitutional amendment, a lawsuit led by then State Senator Raymond Lesniak challenging the

action would be in direct violation of PASPA, which prohibited states from taking action to authorize by law sports wagering schemes. In August 2012, the NFL, National Basketball Association, National Hockey League, Major League Baseball, and the National Collegiate Athletic Association filed a complaint in federal court in New Jersey seeking to enjoin New Jersey from implementing the state constitutional amendment as it violated PASPA. In what may be a surprise to readers unfamiliar with the history of sports wagering in the United States, the various sports leagues vehemently opposed any expansion of sports wagering and argued that permitting sports wagering in New Jersey would undermine the integrity of their sporting contests, even though legal sports wagering existed at the time in Nevada, which they did not oppose, and in the unregulated and illegal black market.

The federal district court concluded that the various sports leagues would suffer a legally cognizable injury sufficient to establish standing to sue and declined to dismiss the lawsuit.⁵⁹ Eventually, the DOJ intervened in the litigation to defend PASPA and represent the interests of the federal government.⁶⁰ In its opposition to the complaint, the state defendants mounted a complete constitutional attack on PASPA, notably that the law violated the anti-commandeering provisions of the Tenth Amendment to the United States Constitution.⁶¹

In February 2013, the district court issued an opinion siding with the sports leagues and the DOJ, holding that PASPA did not exceed Congress' Commerce Clause power, did not discriminate between the states, and did not violate the Tenth Amendment, as it did not force New Jersey to take any legislative, executive, or regulatory action.⁶² This decision was upheld on appeal by the Third Circuit by a 2-1 vote in an opinion written by Judge Julio Fuentes.⁶³ The Third Circuit denied rehearing *en banc* and the United States Supreme Court declined to hear the matter.⁶⁴

Following the loss in the courts, New Jersey passed a new law partially repealing the state's prohibitions on sports wagering to the extent they

constitutionality of PASPA was filed in New Jersey. This lawsuit was dismissed for lack of standing because sports wagering had not yet been approved and authorized in New Jersey. See *iMEGA v. Holder*, 2011 WL 802106 (D.N.J. Mar. 7, 2011).

59. *NCAA v. Christie*, 2012 WL 6698684 (D.N.J. Dec. 21, 2012).

60. *NCAA v. Christie*, 926 F.Supp.2d 551, 553 (D.N.J. 2013).

61. *Ibid.* New Jersey also raised arguments under the commerce clause and equal sovereignty doctrine).

62. *Ibid.* See also Hollander, *supra*, note 52, and Boswell, *supra*, note 56.

63. *NCAA v. Christie*, 730 F.3d 208 (2013). Judge Thomas Vanaskie dissented on Tenth Amendment grounds, and would have held that PASPA unconstitutionally commandeers states by prohibiting states from licensing or authorizing sports gambling).

64. *Christie v. NCAA*, 134 S.Ct. 2866 (2014).

applied to state-licensed racetracks and casinos.⁶⁵ This action was taken due to language in the Third Circuit's opinion that nothing in PASPA required states to maintain laws prohibiting sports wagering. However, the sports leagues again sued and obtained an injunction, returning the matter to the Third Circuit.⁶⁶ In another 2-1 split decision, the Third Circuit again held that New Jersey was in violation of PASPA and that New Jersey's partial repeal of its sports betting prohibitions must be read as affirmatively "authorizing a scheme that clearly violates PASPA."⁶⁷ Interestingly, Judge Fuentes, who wrote the initial panel opinion upholding the constitutionality of PASPA, dissented and asserted that the majority opinion amounted to nothing more than a false equivalency and recognized that New Jersey simply took actions consistent with his own prior opinion.⁶⁸ To the surprise of some, the Third Circuit took the case *en banc*, which resulted in a 9-3 decision in an opinion by Judge Marjorie Rendell, upholding the constitutionality of PASPA and finding that New Jersey's partial repeal of its sports wagering prohibitions was tantamount to an affirmative authorization in violation of PASPA.⁶⁹ Judge Fuentes, now joined by Judge Felipe Restrepo, again dissented, adhering to his view that a repeal of a law cannot be construed as an affirmative authorization and that New Jersey, as a result, did not violate PASPA.⁷⁰ Judge Vanaskie also dissented, and maintained his view that PASPA was unconstitutional under the Tenth Amendment.⁷¹

Judge Vanaskie's opinion would eventually carry the day in May 2018, when the United States Supreme Court issued its opinion in the re-captioned *Murphy v. NCAA*.⁷² In a 6-3 opinion authored by Justice Samuel Alito, the Court held that PASPA's indirect prohibition on sports wagering violated the Tenth Amendment's anti-commandeering principles and found that no

65. See Brent Johnson, *Christie Signs Law Allowing Sports Betting in N.J.*, NJ.Com (Oct. 17, 2014, updated Oct. 27, 2014), available at http://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html.

66. *NCAA v. Christie*, 61 F.Supp.3d 488 (D.N.J. 2014).

67. *NCAA v. Christie*, 799 F.3d 259 (3d Cir. 2015). See also Jordan Hollander, *Update on New Jersey's Efforts to Implement Sports Gambling*, Moored Sports Law Journal Blog (June 22, 2015), available at https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/journal_archives/2015/0622.html.

68. *NCAA v. Christie*, 799 F.3d 259, 269 (Fuentes, J., dissenting). See also Jordan Hollander, *Third Circuit Strikes Down NJ Sports Wagering Again, Appeal Likely*, Moored Sports Law Journal Blog (September 4, 2015), available at https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/journal_archives/2015/0904.html.

69. *NCAA v. Christie*, 832 F.3d 389 (3d Cir. en banc 2016).

70. *Id.* at 402 (Fuentes, J., dissenting).

71. *Id.* at 406 (Vanaskie, J., dissenting).

72. 138 S.Ct. 1461 (2018).

provision of PASPA was severable.⁷³ While Congress could have, if it so determined, directly prohibited sports wagering, it could not, as PASPA did, commandeer states by prohibiting state legislatures from enacting certain laws in order to carry out federal policy. As Justice Alito explained, “[a] more direct affront to state sovereignty is not easy to imagine.”⁷⁴

Immediately following the decision in *NCAA v. Murphy*, states across the country began to authorize retail and online sports wagering. Delaware was the first state to enact a post-PASPA sports wagering law, expanding the types of sports wagering offered in the state similar to what it had previously attempted to do.⁷⁵ New Jersey was the first major new jurisdiction to authorize sports wagering and launched retail sports wagering at the state’s racetracks and casinos in June 2018, followed by online sports wagering in August 2018.⁷⁶

Where Do We Stand and Where Do We Go From Here?

With that historical overview and understanding, that brings us to the current state of online gambling in the United States. Following the 2011 DOJ Memo, it was thought that many states, looking for ways to boost state revenues,⁷⁷ would legalize online casino gambling. While there was an initial push, currently there are only six states with online casinos:⁷⁸

1. Connecticut
2. Delaware
3. Michigan
4. New Jersey
5. Pennsylvania
6. West Virginia

As noted earlier, Nevada permits online poker and Rhode Island has legalized online casinos, including poker, and is expected to launch sometime in 2024.⁷⁹

73. *Ibid.* Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor dissented, mostly on severability grounds).

74. *Id.* at 1478.

75. James Bisson, *Delaware Expands Sports Betting to Include Mobile Sports Betting Apps*, Sportsbook Review (January 2, 2024), available at <https://www.sportsbookreview.com/news/delaware-expands-sports-betting-to-include-mobile-apps-jan-2-2024/>.

76. N.J. Stat. Ann. § 5:12A-10 *et seq.* (2018).

77. Steve Petrella, *Where Are Online Casinos Legal? Tracking All 50 States*, Action Network (June 2, 2023), available at <https://www.actionnetwork.com/casino/legal-states>.

78. See Kredell, *supra*, note 5.

79. Derek Helling, *Rhode Island Ensures that 2023 Isn't a Wash for Online Casino Expansion*, PlayUSA (June 23, 2023, updated October 10, 2023), available at <https://www.playusa.com/ballys-legal-rhode-island-online-casino/>.

Since PASPA was held to be unconstitutional, the following states offer sports wagering.⁸⁰

1. Arizona*
2. Arkansas*
3. Colorado*
4. Connecticut*
5. Delaware*
6. Florida*⁸¹
7. Illinois*
8. Indiana*
9. Iowa*
10. Kansas*
11. Kentucky*
12. Louisiana*
13. Maine*
14. Maryland*
15. Massachusetts*
16. Michigan*
17. Mississippi
18. Montana
19. Nebraska
20. Nevada*
21. New Hampshire*
22. New Jersey*
23. New Mexico
24. New York
25. North Carolina⁸²
26. North Dakota
27. Ohio*
28. Oregon*
29. Pennsylvania*

80. Jurisdictions denoted with an * also offer online sports wagering in addition to retail. Jurisdictions denoted with ** offer only online sports wagering operations.

81. Retail and online sports wagering in Florida is subject to ongoing litigation in state and federal courts, but has launched. See *West Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023). See also Steve Ruddock, *The Never Ending Stories*, Straight to the Point (October 4, 2023), available at <https://straighttothepoint.substack.com/p/the-never-ending-story#%C2%A7the-florida-sports-betting-slog>.

82. Online operations are expected to commence in 2024. See Brian Murphy, *Still No Set Start Date for Mobile Sports Betting in NC: 'There's a Lot Going On,'* WCNC (January 10, 2024), <https://www.wcnc.com/article/news/politics/north-carolina-politics/north-carolina-sports-betting-march-madness-2024-start-time/275-b08cb288-96e5-48ac-82b2-939038b37e60>.

30. Rhode Island*
31. South Dakota
32. Tennessee**
33. Vermont**
34. Virginia*
35. Washington
36. District of Columbia*
37. West Virginia*
38. Wisconsin
39. Wyoming**

While not the focus of this article, it should be noted that online advance deposit wagering on pari-mutuel horse racing is permitted in 40 states.⁸³

It was initially anticipated that many jurisdictions would have authorized online casinos, but only a relative few have actually done so. As can be seen from the lists above, there has been much less opposition to the expansion of sports betting, even though many of the same concerns or issues exist for online casinos. There are a number of reasons why online casinos have not expanded as rapidly and include concerns over cannibalizing the retail market, concerns related to problem gaming, opposition from anti-gambling groups, and logistical issues relating to competition from existing stakeholders, such as racetracks.⁸⁴ Some states merely require new legislation to authorize new forms of gaming, but other states would require constitutional amendments, which can make the process more cumbersome and expensive.⁸⁵ Tribal gaming interests must also be taken into account in many jurisdictions.⁸⁶

83. <https://www.bettingusa.com/racing/advance-deposit-wagering/>

84. See generally Wayne Parry, *Internet Casinos Thrive in 6 States. So Why Hasn't It Caught On More Widely in the US?*, Associated Press (November 4, 2023), available at <https://apnews.com/article/internet-gambling-casino-betting-new-jersey-07086a241a6d66a9c7e8c83e06f00ff6>.

85. For example, the State Constitution of Georgia prohibits all forms of gambling other than lottery and nonprofit bingo. See Ga. Const. Art. I, § II, Para. VIII.

86. See Steve Ruddock, *Sports Betting Holdouts*, Straight to the Point (January 11, 2024), available at <https://straighttothepoint.substack.com/p/sports-betting-holdouts>.

For instance and largely due to tribal opposition, two referendums to legalize sports wagering in California failed in 2022. See Guy Marzorati, *California Voters Reject Measures to Legalize Sports Betting*, NPR (November 9, 2022), available at <https://www.npr.org/2022/11/09/1133986282/california-gambling-prop-26-27-midterm-results>. Due to concerns related to the Wire Act, IGRA, and UIGEA, there is an open question of whether Tribal gaming operations can offer online casino beyond the borders of tribal reservations. For a discussion on this topic, see Koichi R. Aton, *Tribal Casinos and Online Gaming: Hurdles in Modifying*

So where do we go from here? 2024 could be a busy year for legislators and lobbyists, with many states actively considering the legalization of online casino or sports wagering, though some commentators are less than optimistic.⁸⁷ For instance, and as of the writing of this article, legislators in both Maine and New York have recently introduced legislation to authorize online casinos.⁸⁸ Moreover, legislators in both Missouri and Minnesota have introduced sports wagering bills, and there is a renewed push for another constitutional ballot referendum in California.⁸⁹ While it is unlikely that each of these legislative pushes will ultimately be successful in 2024, it seems a good bet that more jurisdictions across the United States will legalize online casinos in the near future and, to the extent they have not already, sports wagering and online sports wagering. We have come a long way from the days of bookies, organized crime, and telephone wires. We now have full-fledged mobile casinos and sports books in our pockets.⁹⁰ With this colorful history in mind, what state will be the next one to roll the dice and authorize online gambling?

State Charters to Meet the Digital Era, 13 UNLV Gaming L.J. 109 (2022), available at <https://scholars.law.unlv.edu/glj/vol13/iss1/6/>. For instance, the Ninth Circuit Court of Appeals has held that IGRA and UIGA do not permit a tribe to offer online gambling to patrons located in California. See *State of California v. Lipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018).

87. See Kredell, *supra*, note 5.

88. Randy Billings, *Tribal Leaders Urge Passage of Gambling Bills*, *New State Office*, Portland Press Herald (January 10, 2024), available at <https://www.pressherald.com/2024/01/10/tribal-leaders-urge-passage-of-gambling-bills-new-state-office/> and see Joe Levy, *Senator Addabbo Files Fresh Online Casino Bill in New York*, *EGR* (January 12, 2024), available at <https://www.egr.global/northamerica/news/senator-addabbo-files-fresh-online-casino-bill-in-new-york/>.

89. See Kurt Erickson, *Sports Betting in Missouri Takes Another Step Forward*, *St. Louis Post-Dispatch* (November 31, 2023), available at https://www.stltoday.com/news/local/government-politics/sports-betting-in-missouri-takes-another-step-forward/article_234492a2-88a9-11ee-8a68-d34ae9eb0723.html, see Pat Evans, *Minnesota Sports Betting Bill Looks Like Best Chance at 2024 Passage*, *Legal Sports Report* (January 9, 2024), available at <https://www.legalsportsreport.com/157492/2024-minnesota-sports-betting-legislative-previous/>, and see Dustin Dorsey, *New Push Underway to Bring Sports Gambling to California*, *ABC 7 News* (November 2, 2023), available at <https://abc7news.com/sports-betting-gambling-legalize-ca/14000645/>.

90. It should be noted that illegal and unregulated gambling, including online gambling, offshore gambling, and skill gaming, still exists and combating such operations remains a priority for the regulated industry. See *Illegal Gambling*, American Gaming Association (2024), available at <https://www.americangaming.org/policies/illegal-gambling/>.