

# Let Texans keep daily fantasy sports

James C. Ho argues the legality of accelerated imaginary play, such as several companies offer

By James C. Ho

Texans love football. For millions of us, that means not just watching football — but playing fantasy football, too.

State attorneys general in New York and Illinois, however, have taken controversial actions to prevent their citizens from playing fantasy sports. Texans are asking whether the same could happen here.

Based on my experience, it would be surprising if Texas followed suit, considering our laws, legal traditions, and stalwart opposition to prosecutorial abuse and executive overreach.

The Texas Legislature has expressly authorized games that offer prizes to “the *actual contestants* in a bona fide contest for the determination of *skill*.” These games are authorized even if they “partially” involve “chance.”

Fantasy sports fall easily into this category. Participants are not passive spectators. Contestants use their skill as fantasy general managers to research and build their own teams. They make calculations about player value, and assemble teams that comply with a specified “salary cap,” based on the latest information and conditions.

Success or failure as a fantasy general manager rests overwhelmingly on the same skills and strategies as other activities that are indisputably premised on skill — such as building an investment portfolio, day-trading stocks, or purchasing oil futures. While those activities involve some measure of chance, they undoubtedly require research, preparation, and skill to be successful.

Statistics experts who have closely studied the issue have concluded that fantasy sports are “bona fide contests for the determination of skill” — and that chance is “overwhelmingly immaterial” to success as a daily fantasy sports contestant.

So fantasy sports are entirely lawful in Texas, and millions of Texans have played fantasy sports — openly and without legal incident — for several decades.

Even if reasonable minds were to disagree with the experts, fantasy sports are still lawful. After all, to quote Justice Antonin Scalia, when the law is in doubt, “the tie must go” to the citizen over the state.

Since our nation’s founding, our legal system has followed one simple “liberty-protecting and democracy-promoting rule.” As Justice Scalia has explained, “no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.” So if the law is ambiguous, the Legislature must “speak more clearly.” Prosecutors cannot create new crimes on their own.

Texas leads the nation in fighting abuses of executive power. The attorney general’s office is currently holding President Obama accountable for abuses of executive orders before the U.S. Supreme Court.

The attorney general’s office also carefully guards against the risk of its own abuses. As former Texas Attorney General Greg Abbott and his predecessors have observed, “We do not opine on the legality of any particular contest.” Determining whether a particular game involves chance “is a question of fact that cannot be resolved in the opinion process.”

So if anyone wants to disagree with experts who have concluded that fantasy sports are contests of skill — and that chance is “overwhelmingly immaterial” to success in fantasy sports — that is, of course, their right. But it is a dispute of fact. And resolving disputes of fact is the province of judges and juries, applying laws enacted by the Legislature — not state attorneys general wielding unilateral power through executive orders or legal opinions.

In a recent Republican Presidential debate, Gov. Chris Christie ridiculed a reporter for even suggesting the possibility of banning fantasy sports: “Are we really talking about getting government involved in fantasy football? We have \$19 trillion in debt. We have people out of work. We have ISIS and al-Qaeda attacking us. And we’re talking about fantasy football? . . . Enough on fantasy football. Let people play. Who cares?”

No other Republican candidate disagreed with Gov. Christie on this point.

Christie hails from New Jersey. But he sounded like a Texan. Texans cherish our football — almost as much as we cherish our freedom.

---

*James C. Ho is the former Solicitor General of Texas and is a partner in the Dallas office of Gibson, Dunn & Crutcher. He recently wrote a legal opinion in support of daily fantasy sports for DraftKings, one of the companies at the center of inquiries into daily fantasy sports in various states, including Texas. Reach him at [jho@gibsondunn.com](mailto:jho@gibsondunn.com).*