



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

TELEPHONE  
(208) 334-2400

JIM JONES  
ATTORNEY GENERAL

February 26, 1985

The Honorable Lydia Edwards  
House of Representatives  
State of Idaho  
STATEHOUSE MAIL

THIS IS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 120

Dear Representative Edwards:

You have asked the Office of the Attorney General for an opinion regarding the constitutionality of House Bill 228. That bill makes it a misdemeanor to "use, possess, operate, keep, sell, or maintain for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever." The bill creates an exception in the case of "antique slot machines," i.e., exclusively mechanical (non-electronic) machines manufactured prior to 1950 "for purposes of display only and not for operation."

It is our opinion that H.B. 228 would be a constitutional exercise of power by the Idaho Legislature.

The Constitution of the State of Idaho provides, in article III, section 20, that, "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever." Chapter 38 of the Criminal Code (title 18) defines gambling as a misdemeanor and directs judges to issue warrants to seize and destroy gaming tables and other gaming devices.

The Idaho Supreme Court has held that an attempt by the legislature in 1947 to legalize slot machines was unconstitutional. State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953). The court in that opinion held that slot machines were "lotteries" and that they could be "used for no purpose except to violate the law." Id. at 527. The court relied on an earlier decision which had held:

that the only possible value they [slot machines] can have is for use in violating the penal statutes of this state; that in order to be valuable and command any price in the market, it is necessary that they be used in the commission of crime.

Mullen & Co. v. Moseley, 13 Idaho 457, 464 (1907).

In more recent decisions, the Idaho Supreme Court has backed away from holding that ownership of slot machines is criminal per se. In State v. Johnson, 77 Idaho 1, 287 P.2d 425 (1955), the court interpreted the Garden City case as standing for the proposition that "it is the use of the devices which violates the law." Id. at 10 (emphasis in original).

Finally, in Prendergast v. Dwyer, 88 Idaho 278, 398 P.2d 637 (1965), the court faced a challenge to the seizure of gaming devices by a defendant who claimed they were not, in fact, used for gambling purposes. The court there distinguished between:

whether the device is malum in se and therefore contraband or whether it is capable of legitimate use. . . .

Id. at 286.

The court held that it was unconstitutional to seize and destroy the property in question once the defendant had raised the defense that the gaming device was not one used for gambling.

Thus, the Idaho Supreme Court has chosen not to join those states that hold it is criminal per se to possess a gaming device (slot machine), regardless of whether it is in operation or even whether it is operable at all. See, for example, In the Destruction of One Gambling Device, 16 Wash.App. 859, 559 P.2d 1003 (1977).

It follows that the Idaho Legislature would be free to enact legislation criminalizing the use of slot machines but authorizing ownership of "antique slot machines" for the sole purpose "of display only and not for operation." It should be noted, however, that it is already criminal in Idaho to use or

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operate gaming devices and it is already legal to possess such devices if one does not intend to use them for gambling purposes. House Bill 228 would only be making this more clear.

Indeed, H.B. 228 would actually cut back on existing rights because it would criminalize "for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever." At present, Idaho law makes it illegal to use or operate or provide such devices for gambling purposes, but it would be a good defense to show that the machines were used otherwise. It would also be a good defense to show that the machine was inoperable (unless one were providing parts for gambling purposes). H.B. 228 would take away both of these defenses, thereby criminalizing conduct now legal in Idaho.

If you have any further questions in this matter, please contact me.

Sincerely,



JOHN J. McMAHON  
Chief Deputy

JJM/lh