

This opinion was written in response to a request for a waiver to obtain and operate gaming devices on a Continental United States (CONUS) military installation. Upon review, we find the requested action unlawful.

## BACKGROUND

A CONUS military installation expressed interest in obtaining and operating gaming machines as part of the base's Morale, Welfare, and Recreation (MWR) program in order to ensure the safety of its base personnel<sup>1</sup> and generate revenue that would be used to bolster the installation's MWR programs, thus, allowing the installation to offer more entertainment options, strengthening the base community, and giving Airmen a safe and controlled environment for entertainment. In this case, the commander would like to place the gaming machines at a location on the installation that is in an area of State proprietary jurisdiction.

## LAW

*Is it lawful to operate gaming machines on military installations located in the United States and, if so, is an Air Force waiver request to the Office of the Secretary of Defense (OSD) appropriate in this case?*

Based on our review of the relevant Federal, Department of Defense, and Air Force regulations, operating gaming devices on a CONUS military installation (even in an area with State Proprietary jurisdiction) is not lawful and a waiver request is not recommended.

### *Federal Statute*

Under Federal Law, it is unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device<sup>2</sup> in the District of Columbia, in any possession of the United States or within the special maritime and territorial jurisdiction of the United States.<sup>3</sup>

18 U.S.C. § 7 defines the special maritime and territorial jurisdiction of the United States, in part, as: "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof..."

Although 15 U.S.C. § 1175 prohibits gaming devices in areas of exclusive or concurrent jurisdiction, the legislative history is illustrative in understanding the Congressional purpose underlying 15 U.S.C. § 1175 and its processor public law. Department of Justice Memorandum Opinion for the General Counsel, Department of Defense, *Installation of Slot Machines on U.S. Naval Base, Guantanamo Bay*, March 29, 1982 states:

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<sup>1</sup> The installation noted that many of its base personnel frequent gambling facilities right outside the gates of the base. Unfortunately, many of these establishments are unsafe. As a result, the installation sought permission to provide gaming devices on base to provide a safe environment for members to utilize.

<sup>2</sup> Per 15 U.S.C. § 1171(a)(1), gambling devices include "any so-called 'slot-machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon..."

<sup>3</sup> 15 U.S.C. § 1175.

- a. “Section 1175 was passed as part of the Anti-Slot Machine Act, 64 Stat. 1135 (1951), whose primary, though not exclusive, purpose was to assist the states in enforcing their anti-slot machine laws.”
- b. Additionally, “although the predominant purpose of the Act may have been to assist in the enforcement of anti-slot machine laws of the states, Congress was disturbed by the use of slot machines in any area under its jurisdictional authority and intended to prohibit machines from all land over which the federal government exercised exclusive or concurrent jurisdiction, regardless of the effect on the operation of state laws.”
- c. Finally, the Department of Justice determination in this memo was that section 1175 precluded “the installation or use of slot machines on any land under exclusive United States jurisdiction, and that this prohibition extends to the U.S. Naval Base at Guantanamo Bay because of the lease terms which grant the United States ‘complete jurisdiction and control over’ that property.”

*Code of Federal Regulations (CFR)*

Additionally, 5 CFR § 735.201 states, “While on Government-owned or leased property or while on duty for the Government, an employee shall not conduct, or participate in, any gambling activity including the operation of a gambling device, conducting a lottery or pool, a game for money or property, or selling or purchasing a numbers slip or ticket.”

Furthermore, 41 CFR § 102-74.395 states the policy concerning gambling: (a) Except for the vending or exchange of chances by licensed blind operators of vending facilities for any lottery set forth in a State law and authorized by section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*), all persons entering in or on Federal property are prohibited from (1) participating in games for money or other personal property; (2) operating gambling devices; (3) conducting a lottery or pool; or (4) selling or purchasing numbers tickets.

*Department of Defense Regulations*

Several DoD issuances also speak to this issue. DoD 5500.07-R, *Joint Ethics Regulation (JER)*, provides:

- a. While on Government-owned or leased property or on duty for the Government (for military members, this means, in this context, present for duty), an employee shall not conduct or participate in any gambling activity, including operating a gambling device, conducting a lottery or pool, participating in a game for money or property, or selling or purchasing a numbers slip or ticket.<sup>4</sup> JER, paragraph 2-302(a).
- b. Gambling may be prohibited by Federal Government building and grounds regulations, such as 32 CFR 234 (Reference (o)) which prohibits gambling in the Pentagon.<sup>5</sup> Paragraph 2-302(c).

DoDI 1015.10, *Military Morale, Welfare, and Recreation (MWR) Programs*, Enclosure 3, paragraph 14.a(1), authorizes military services to operate gaming machines “[i]n locations outside the 50 United States.” The Air Force exercises this authority granted by DoDI 1015.10 through the Air Force gaming

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<sup>4</sup> See 5 CFR 735.201 (Reference (m)).

<sup>5</sup> See also 41 CFR 102-74.395 and 5 CFR 735.

program, governed by AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility*.

### *Air Force Regulations*

According to AFI 34-101, paragraph 15.1, “The Air Force gaming program provides a recreational opportunity...at overseas locations...” The instruction emphasizes that “gaming machines are only lawfully authorized at overseas installations.”<sup>6</sup> In addition, this instruction identifies the waiver authority for this requirement as “T-0,” meaning that the waiver authority is external to the Air Force.<sup>7</sup>

### *2017 GAO Study*

On 30 January 2017, the US Government Accountability Office (GAO) released GAO-17-114, *MILITARY PERSONNEL: DoD and the Coast Guard Need to Screen for Gambling Disorder Addiction and Update Guidance*. The report was written at the request of Congress and found that the Services should medically screen members for gambling addiction. The GAO recommendation was placed into law in the FY19 National Defense Authorization Act, Section 733, which requires the DoD to incorporate questions specific to gambling into Service members’ annual health screenings.

### DISCUSSION

15 U.S.C. § 1175, coupled with the definition of special maritime and territorial jurisdiction of the United States found in 18 U.S.C. § 7, clearly prohibit the possession and use of gambling devices on CONUS military installations which sit in exclusive or concurrent jurisdiction. This is consistent with the 1982 Department of Justice determination and DoD/Air Force policy which excludes gaming machines from CONUS installations.

In this case, the gaming machines contemplated for the installation would sit in proprietary jurisdiction, which allows the State to retain authority over the area and which could arguably remove the installation from the definition of special maritime and territorial jurisdiction and render section 1175 inapplicable. However, if we were to accept this interpretation, we would ignore the overwhelming body of Congressional intent, regulation, and government policy which strongly supports the position that there can be no gaming devices on military installations.

The clearest expression of this is found in 5 CFR § 735.201 which prohibits gambling while on “government-owned or leased property.” Additionally, 41 CFR § 102-74.395 prohibits all persons entering in or on federal property from operating gambling devices. Neither CFR provision is dependent on the jurisdiction of the military installation. Finally, the JER states that while on government-owned or leased property, government employees “shall not conduct or participate in any gambling activity, including operating a gambling device.”

We also cannot ignore that there has been, and still appears to be, hesitancy in Congress to allow military installations to obtain, possess, and permit use of gaming devices. Recent media and the GAO Study suggest that there is specific concern about gambling addiction. As such, we believe it would prove difficult for the Air Force to move forward with CONUS gaming devices. Additionally, pursuing a waiver for a

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<sup>6</sup> AFI 34-101, paragraph 15.3.

<sup>7</sup> See AFGM to AFI 33-360, *Publications and Forms Management*, Attachment 2, Table 1.1.

single CONUS location may very well jeopardize the OCONUS gaming operations which fund important MWR programs for our troops overseas.

In our review, we found no legal authority for the Air Force to obtain and operate gaming machines on a CONUS installation. DoDI 1015.10, Enclosure 3, paragraph 14.a.(1) authorizes the Military Services under certain circumstances to operate gaming machines “[i]n locations outside the 50 United States and its territories and possessions.” Although DoDI 1015.10 does not expressly prohibit Military Services from operating gaming machines on installations within the United States, when DoDI 1015.10, Enclosure 3, paragraph 14.a is read as whole, a prohibition on such activity is implied. With the exception of subparagraph 14.a.(1), which authorizes gaming operations at overseas locations, the other remaining three subparagraphs discuss activities which may be permitted “within the United States” under certain circumstances (bingo, raffles, Monte Carlo and/or recreational card game tournaments). Since there is no explicit DoD authorization for the Military Services to operate gaming machines within the United States, our interpretation is that this activity is not permitted by the DoD. This interpretation makes sense in light of the fact that AFI 34-148 indicates that “[g]aming machines are only lawfully authorized at overseas installations” and the waiver authority is external to the Air Force.

## CONCLUSION

In closing, while concern expressed by the installation in its request is well founded, the use of gaming machines on the Air Force base is not a prudent solution at this time, as it does not comply with Congress’s intent in prohibiting gaming devices on CONUS installations. As a result, OSD is unlikely to approve a waiver for reasons discussed above, and we do not recommend a request for a waiver be submitted.

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