



THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

March 27, 1973

Honorable David Finney
Chairman, State Affairs Committee
P. O. Box 2910
Austin, Texas 78767

Letter Advisory No. 2

RE: House Bill 168

Dear Representative Finney:

You have requested our advice regarding the constitutionality of House Bill 168 giving the Governor certain budgetary authority.

Briefly, the Bill permits him to require that all State agencies, departments, schools, commissions or institutions, submit "quarterly expenditure plans" for his review, and charges him with implementing the adopted state budget. He is authorized to withhold approval of expenditures he considers unnecessary because of certain changed conditions. He may later release withheld funds, but if he does not, they revert to the Treasury. Agencies may obtain public hearings concerning withheld funds, and upon request of an agency, the Governor may transfer funds allocated to that agency from one appropriation item to another within the agency, when it appears the legislative intent will be served.

We think H.B. 168 in its present form would be held unconstitutional. It is our opinion that the Legislature may not invest the Governor with supervisory authority over any agencies or offices whose functions and duties could not have been assigned originally to the Governor's office by statute; that it cannot subordinate to his office any other executive office of constitutional rank except as the Constitution allows; and that it cannot confer upon him either strict legislative or strict judicial powers. Where, however, the Legislature has created agencies whose only functions are those which originally might have been conferred upon the Governor had the Legislature so chosen, we think the Legislature may restructure the agencies to make them answerable to the Governor in monetary matters, without violating the principle of separation of powers.

There is a fundamental difference between the appropriation of funds and their expenditure. The first is a legislative function. Only the Legislature may designate the purposes and uses to which public moneys may be devoted. The veto power of the Governor is a negative instrument assigned to him by the Constitution as a check upon the legislative branch of government. It is the only constitutional means by which the Governor can control the legislative power to appropriate money for a particular purpose or use, and the Legislature is constitutionally incapable of delegating to him a larger legislative role.

The expenditure of funds, however, is not a legislative function. Once the Legislature has appropriated funds for a particular purpose or use, it is the duty of the responsible executive authority to accomplish (not frustrate) that purpose by using such funds as necessary. The discretion involved in their expenditure is an executive discretion which the Legislature may broaden or narrow by enlarging or restricting the purpose for which the appropriation is made. The range cannot be so narrow as to interfere with the discharge of duties imposed upon the executive by the Constitution, nor may the statement of purpose broadly amount to a legislative abdication of responsibility. But so long as the leeway allowed is controlled by sufficient, definite, legislatively-imposed directions or standards, the appropriation to the executive need not be itemized in detail. When not barred by the Constitution, the Legislature may lodge that discretion in the executive officer of its choice.

If the Legislature is dealing with administrative agencies of its own creation, discharging functions or duties which the Legislature might have originally directed the Governor to discharge, there is no constitutional obstacle to so restructuring an agency as to place supervision over its expenditures in the Governor's hands. In such a case, the Governor would no more wield legislative power than he does when he spends money appropriated directly to his office.

But transferring funds from one appropriation item to another, even though confined to transfers within a single agency, as called for by H.B. 168, is another matter. The appropriation of money for a particular purpose is purely a legislative function and cannot be delegated to the Governor or any other executive officer. If the Legislature has made an appropriation for a narrow purpose, an executive officer cannot change the purpose for which the appropriated money can be spent--even if conditions

have radically changed. The Legislature can avoid such a result only by designating a broader appropriative purpose and leaving to the executive the particular applications of the fund. Given the discretion, the officer may decline to spend the appropriated money if its expenditure cannot achieve the purpose, but he cannot divert it to other uses. No continuing veto over appropriations can be given even where, within the limits of the designated purpose, supervisory power over expenditures might be assigned.

The Bill is invalid also because it purports to subject to the supervisory authority of the Governor those executive offices and departments established by the Constitution. The framers of our Constitution shaped a plural executive to administer the State. The relationship of the offices constituting the executive branch of government is fixed by the Constitution, and the Legislature cannot alter it. Though the Governor may demand certain disclosures of them pursuant to Article 4 § 24 of the Constitution, he cannot interfere with the exercise of their power or assume any supervisory control over them.

The separation of powers principle also denies him any such supervisory role over legislative or judicial arms or agencies of the government. If they discharge functions which constitutionally could not be assigned to the Governor initially, he cannot be given supervision over them.

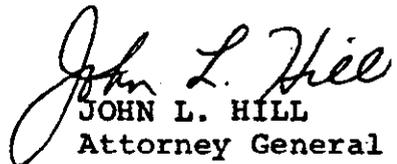
In any event, the present provisions of H.B. 168 would seem too broad so long as they remain unsupported by other legislation. The Bill impliedly affects many present statutes, but without a legislative designation of those particular agencies to be affected and the manner in which the Governor's supervision of expenditures is to be integrated with their decision process, the proposed legislation could be attacked as too uncertain for application.

We think the following authorities support the above statements: Houston Tap and Brazoria Railway Co. v. Randolph, 24 Tex. 317, 344 (1859); Kuechler v. Wright, 40 Tex. 600, 623 (1874); Bullock v. Calvert, 480 S.W.2d 367, 370 (Tex. 1972); National Biscuit Co. v. State, 135 S.W.2d 687, 693 (Tex. 1940); Fulmore v. Lane, 140 S.W. 405, 411 (Tex. 1911); Jones v. Alexander, 59 S.W.2d 1080 (Tex. 1933); Trimmier v. Carlton, 296 S.W. 1070 (Tex. 1927); Trapp v. Shell Oil Co., 198 S.W.2d 424 (Tex. 1946); Terrell v. Sparks,

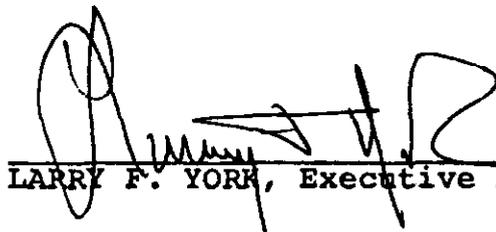
135 S.W. 519 (Tex. 1911); Adams v. Calvert, 396 S.W.2d 948 (Tex. 1965); Williams v. State, 176 S.W.2d 177 (Tex.Crim. 1943); Suppiger v. Enking, 91 P.2d 362 (Idaho, 1939); In Re Opinion of the Justices, 19 N.E.2d 807, 815 (Mass. 1939); Wells v. Childers, 165 P.2d 358 (Okla. 1945); State v. State Board of Finance, 367 P.2d 925 (N.M. 1961); Sellers v. Frohmiller, 24 P.2d 666 (Ariz. 1933); People v. Tremaine, 168 N.E. 817 (N.Y. Ct. App. 1929); 81 C.J.S., States § § 161, 167; 63 Am.Jur.2d, Public Funds, § 52; Attorney General Opinions V-1254 (1951, p. 13, et seq) and M-1227 (1972). Attorney General Opinions M-1141 (1972), M-1191 (1972) and 1199 (1972) should be read in the light of this Letter Advisory.

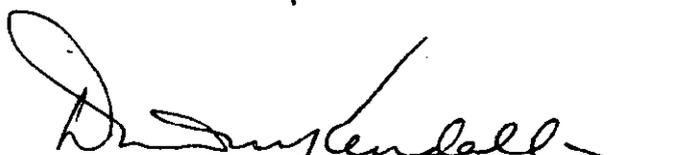
It is, therefore, our opinion that House Bill 168, as written, is unconstitutional. The Legislature might validly confer upon the Governor discretion to approve or disapprove expenditures of funds appropriated to restructured state agencies discharging only duties which could be constitutionally discharged by the Governor. However, it cannot vest in him supervision over expenditures by other governmental agencies, departments or offices; and in no case whatsoever may it validly empower him to alter the purpose for which appropriated funds may be spent.

Very truly yours,


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APPROVED:


LARRY F. YORK, Executive Assistant


DAVID M. KENDALL, Chairman
Opinion Committee