



THE ATTORNEY GENERAL OF TEXAS

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May 17, 1973

The Honorable Charles F. Herring
Chairman, Jurisprudence Committee
Texas State Senate
Austin, Texas

Letter Advisory No. 42

Re: Senate Bill 212. Whether
the Legislature may con-
stitutionally delegate the
power to create new crimes
by administrative action and
to apply penalties to acts
which the Legislature itself
has not designated as a crim-
inal offense.

Dear Senator Herring:

You have submitted to us a copy of Senate Bill 212, a Bill having to do with the regulation of "certain drugs and controlled substances," with the request that we determine the constitutionality of the Legislature delegating to the Commissioner of Health the power to designate additional substances as "controlled," to which additional substances the penalties for unauthorized possession, manufacture or use prescribed by the Act would automatically attach.

The Act is a lengthy one and one which is rather complicated. We therefore limit our review to the precise "delegation" question which you have raised, and have not considered the validity of the Bill in any other aspect.

Generally, by its terms, the Bill would require persons manufacturing, distributing or dispensing controlled substances to register. The unauthorized manufacture, delivery or possession of the controlled substances is made a crime.

The penalties prescribed by subchapter 4 of the Bill depend to a large extent upon the "schedule" into which the particular controlled substance in question falls.

The five "schedules" are contained in subchapter 2. Schedule 1, which lists some 85 substances, includes opiates, opium derivatives, hallucinogenic substances and synthetic equivalents of cannabis. (§ 2.03). Other sections define other schedules. Each lists substances of differing characteristics.

The tests for the addition of substances to each of the schedules are (1) the potential for abuse, (2) whether or not the substance has any safe, accepted medical use; and (3) the extent to which it may lead to physical or psychological dependence. Based upon those tests and eight specific factors which he is to consider in originally concluding that a "potential for abuse" exists, the Commissioner of Health is given the power to add other substances to particular schedules, thus classifying their unauthorized manufacture or possession as a crime. He cannot, however, add substances once the Legislature has declined by an affirmative vote of either the House or the Senate to place the substance on the schedules. Nor may he extend scheduling to distilled spirits, wine, malt beverages or tobacco.

Subchapter 4 defines offenses and their penalties, dependent upon the schedule in which the involved substance is found. Thus, for example, § 4.01 having to do with the unauthorized manufacture, delivery or possession of a controlled narcotic substance, makes a violation a felony punishable by confinement of life or for any term of years not less than sixteen years. Manufacture, delivery or possession of other scheduled substances carry lesser penalties.

Your question is whether it is constitutional for the Legislature to delegate to the Commissioner of Health the power to add substances to the five schedules and thus make punishable the manufacture, possession or sale of those additional substances.

Article 2, § 1 of the Constitution of the State of Texas provides for a separation of powers between the three departments of the government - the legislative, the executive and judicial. Nevertheless, it is generally recognized that the Legislature may delegate to an administrative agency the power to make rules which have the effect of law. This is particularly true when the Legislature itself cannot practically and efficiently perform the function.

The administrative agency in exercising the delegated powers is acting as an agency of the Legislature. The Legislature must declare the policy and must fix standards by which the agency is to be guided.

It is our opinion that the provisions of proposed Senate Bill 212, giving to the Commissioner of Health the responsibility of adding substances to the various schedules of controlled substances is constitutional. The Commissioner is not given the power to delete substances from the schedules and thus, arguably, suspend laws contrary to Article 1, § 28 of the Constitution.

The content of each of the five schedules is well defined and not only is the Commissioner bound by those definitions in adding substances to the schedules but he is, in addition, instructed specifically as to eight factors which he is to consider before concluding that any substance has a "potential for abuse," and thus, should be scheduled. He is given considerable discretion in that regard, but he does not fix the penalty. The Legislature does that. His only action is to find facts and, based on those facts and governed by the prescribed standards, to add substances to those already covered by the schedules.

The provision is largely patterned after § 811 of the 1970 Federal Controlled Substances Act (21 U. S. C. § 811) which so far has been free from constitutional attack. In Williams v. State, 176 S. W. 2d 177 (Tex. Crim., 1943), the Texas Court of Criminal Appeals upheld a similar delegation of authority to the Pink Bollworm Commission which was empowered to designate areas of the State infested with bollworms. The law specified that it was a crime to grow cotton, except by administrative authorization, in areas so designated. We think Williams controls this question.

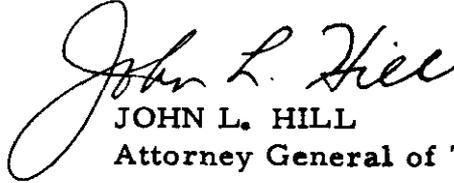
In answer to your inquiry, it is our opinion that Senate Bill 212 does not unconstitutionally delegate legislative authority to the Commissioner of Health.

See William v. State, 176 S. W. 2d 177 (Tex. Crim., 1943); Stockwell v. State, 221 S. W. 932 (Tex., 1920); Trimmier v. Carlton, 296 S. W. 1070 (Tex., 1927); Texas National Guard Armory Board v. McCraw, 126 S. W. 2d 627 (Tex., 1939); Trapp v. Shell Oil Co., 198 S. W. 2d 424 (Tex., 1946); Tuttle v. Wood, 35 S. W. 2d 1060 (Tex. Civ. App., San Antonio, 1930, err. ref'd.); Southwestern Savings and Loan Ass'n. v. Falkner, 331 S. W. 2d 917 (Tex., 1960); Beall Medical Surgical Clinic and Hospital, Inc. v. Texas

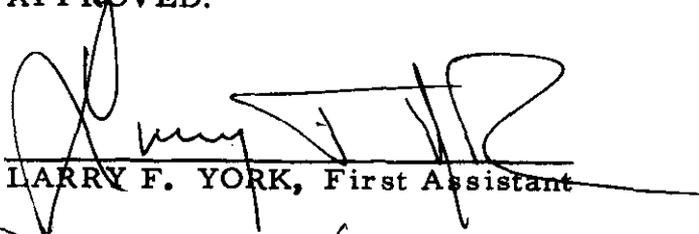
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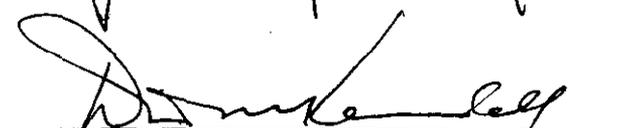
State Board of Health, 364 S. W. 2d 755 (Tex. Civ. App., Dallas, 1963, no writ); Cf. Margolin v. State, 205 S. W. 2d 775 (Tex. Crim., 1947).

Very truly yours,


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