



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL,
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May 21, 1973

The Honorable Price Daniel, Jr.
Speaker of the House of Representatives
State Capitol Building
Austin, Texas

Letter Advisory No. 43

Re: House Bill No. 1

Dear Speaker Daniel:

You have sent us the Senate substitute for House Bill No. 1 adopted by the Senate on May 15, 1973, and have asked us eleven specific questions concerning its provisions. We do not find it necessary, therefore, to review the entire Bill.

Your first question asks:

"With regard to Section 2, Subsection (4), of the substitute, does the disqualification of those who failed to file the required statements from having their names appear on any primary, run-off, special or general election ballot operate as an additional qualification for the office? If so, is the provision constitutional?"

Insofar as it is applicable to your question, subsection (4) of § 2 provides:

" . . . Any person seeking an elective office covered by Section 2 (1) hereof shall, not later than five (5) days after the filing date for election to such office, file the disclosure provided for in this Act. The failure of any person seeking such office to file such statement shall disqualify such person from having his name placed on either a primary, run-off, special or general election ballot and the officer in charge of any such election shall enforce this provision. "

With the exception of certain of the judges of statutory courts of domestic relations, those to whom the provisions of the Bill are made applicable by § 2 are all constitutional officers. Qualifications of members of the Legislature are set out in §§ 6 and 7 of Article 3 of the Constitution. The members of the Executive generally are elected according to § 3 of Article 4. All of them are subject to disqualification on certain grounds stated in Article 16. The Governor (Article 4, § 4) and the Lieutenant Governor (Article 4, § 6) are subject to specific affirmative qualifications. The qualifications of members of the Supreme Court (Article 5, § 2), of the Court of Criminal Appeals (Article 5, § 4) and of the several Courts of Civil Appeals (Article 5, § 6) as well as district judges (Article 5, § 7) are set by the Constitution.

As early as 1924, when efforts were made to rule Mrs. Miriam Ferguson ineligible to be a candidate for Governor, it was held that, where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to those, unless that power is expressly given by the Constitution. In Dickson v. Strickland, 265 S. W. 1012 (Tex. 1924), the court rejected efforts to disqualify Mrs. Ferguson because she was a woman, because she was married, and because her husband had been impeached.

In State v. Court of Civil Appeals, 75 S. W. 2d 253 (Tex. 1934) an effort was made to disqualify James V. Allred and to keep his name off the ballot as candidate for Governor because of an excessive expenditure which allegedly violated the Corrupt Practices Act (Article 3168 - 3173, V. T. C. S.) which provided for a forfeiture of the right to appear on the ballot. The court cited the rule of Dickson v. Strickland, and held the statute unenforceable.

Other similar decisions are Henderson v. Democratic Executive Committee, 164 S. W. 2d 192 (Tex. Civ. App., Waco, 1942, no writ) (failure to pay poll tax did not disqualify a legislative candidate); Burroughs v. Lyles, 181 S. W. 2d 570 (Tex. 1944) (attempting to disqualify a candidate for the Legislature because of occupancy of another office); Luna v. Blanton, 478 S. W. 2d 76 (Tex. 1972) (the Election Code could not add additional residence requirements for legislative candidates).

On the other hand, the Legislature may provide that no ineligible person will have his name on the ballot. Kirk v. Gordon, 376 S. W. 2d 560 (Tex.1964); Burroughs v. Lyles, supra. The Legislature may determine the qualifications of statutory officers. Oser v. Cullen, 435 S. W. 2d 896 (Tex.1968)

It is our opinion that the attempted disqualification of those who fail to file the required disclosure is unconstitutional insofar as it applies to constitutional officers, who make up the majority of those subject to the disclosure provisions of the Act.

Your second question is:

"Is the sanction provided in Section 2, Subsection (5) of the bill prohibiting a person from 'carrying on' the duties and responsibilities of office after failing to file the annual statement thereafter constitutional in view of the fact that the Constitution specifically provides both the circumstances and the methods for impeachment and removal from office?"

Subsection 5 of § 2 of the Bill is as follows:

"No person required to file a statement hereunder shall assume office without making the initial filing required hereunder, nor shall such person continue to carry on the duties and responsibilities of office after failing to file the annual statement thereafter required hereunder."

Impeachment is governed by the provisions of Article 15 of the Constitution of Texas. It is the constitutional means of removing the Governor, the Lieutenant Governor, the Attorney General, the Treasurer, the Commissioner of the General Land Office, the Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court. (Article 15, § 2). Section 11 of Article 3 provides that each House of the Legislature may punish its own members for disorderly conduct and, with the consent of two-thirds, expel a member.

In our opinion, except for the domestic relations judges who are not constitutional officers, the sanction provided in § 2, subsection (5) prohibiting a person from "carrying on" in office after failing to file the statement would not be constitutional.

Your third question is:

"In the case of a person gaining office by appointment, Subsection (4) of Section 2 requires him to file a disclosure statement 'not more than ten (10) days after' the day he takes the oath of office. But Subsection (5) prohibits a person required to file a statement from assuming office without making the initial filing. Are these two provisions in irreconcilable conflict with regard to those persons? If so, what would be the legal interpretation of the two subsections in this regard?"

Subsection 4 of paragraph 2 requires: ". . . the financial disclosure statement herein required shall be filed not more than ten (10) days after the day the person required to file hereunder first takes the oath of office . . ." Subsection (5) is:

"No person required to file a statement hereunder shall assume office without making the initial filing required hereunder, nor shall such person continue to carry on the duties and responsibilities of office after failing to file the annual statement thereafter required hereunder."

We believe it is possible, by a strained construction, to reconcile the two provisions as meaning that an appointee must file his statement within ten days after he first takes the oath of office, but that he may not undertake or assume the duties of his office until he has filed it.

Since we are not interpreting a bill which has been enacted, but are attempting to determine its problems beforehand, we would suggest that the intention of the Legislature be clearly stated.

Your fourth question asks:

"Also in the case of a person gaining office by appointment, Subsection (4) of Section 2, after stating the initial filing requirement, provides: ' . . . and/or that person shall file such a statement annually thereafter . . . ' In your opinion, what is the effect of 'and/or' in this instance? Further, is the term 'annually' specific enough for the purposes of this bill? Finally, is there any provision in this subsection, or elsewhere in the bill, requiring the filing of statements, other than the initial statement, by persons who gain office initially by election rather than appointment? "

Subsection 4 reads in part:

"For officers gaining an office covered by Section 2(1) heretofore by appointment, the financial disclosure statement herein required shall be filed not more than ten days after the day the person required to file hereunder first takes the oath of office and/or that person shall file such a statement monthly thereafter"

You actually ask three questions in your paragraph numbered 4. The first is as to the effect of "and/or". It either means that a person appointed to office must file the statement within the first ten days and annually thereafter, or that he must file the statement within the first ten days or annually thereafter. In our opinion, this language renders the provision ambiguous and impossible of interpretation.

The second part of the fourth question asks whether the term "annually" is specific enough for the purposes of the Bill. We believe it is.

You ask finally whether there is any provision in House Bill No. 1 requiring the filing of statements other than the initial statement by persons who gain office initially by election. Our answer is that there is not. A person seeking office by election is required to file a statement not later than five days after the filing date for the election but is not called upon to file any further report.

Your fifth question asks: "In the light of the sanctions provided in the substitute (see Section 7), is Subsection (1), Section 3 enforceable? Subsection 1 of § 3 provides:

"(1) Any person required to file a financial disclosure statement under this Act shall maintain records covering such filing period covered by such report in accordance with generally accepted accounting principles, upon which the items of information so reported are based, and keep the same for a period of four years after the filing of the financial record."

Section 7(1) provides:

"If any person fails to comply with any provision of this Act, the Attorney General may, on the request of the Secretary of State initiate and maintain a civil action in an appropriate district court for an order of the court requiring such person to comply with any such provision or regulation with respect to which compliance is sought. Failure to comply with such court order within a reasonable period time not to exceed fifteen days, shall be punishable by a fine of not more than \$5,000 or imprisonment in the county jail for not more than two years, or both."

It is our opinion that subsection 1 of § 3 is enforceable and that if a person fails to keep such records he would first be subject to a court order requiring him to comply and if, after the issuance of such order, he failed to comply he would be subject to contempt, punishable by the fine and imprisonment specified.

Your sixth paragraph asks:

"In Section 4, the term 'public office or civil position of trust under the State' is used, but the bill contains no definition of the term. What offices or positions would the term cover?"

Terms such as "public office" and "civil position of trust" or similar terms are used frequently and through the Constitution. See for instance Article 3, §§ 18, 19, 33 and 40. They may not be precisely defined. We would say, however, that we think the terms used in the substitute bill will include every person in the employ of the State or one of its subdivisions, except those whose job has not been created by law, and whose duties do not involve the exercise of a portion of the sovereign power, and whose performance is ordinarily not of public concern. Willis v. Potts, 377 S. W. 2d 622 (Tex. 1964); Aldine Independent School District v. Standley, 280 S. W. 2d 578 (Tex. 1955); Pruitt v. Glen Rose Independent School District No. 1, 84 S. W. 2d 1004 (1935); Odem v. Sinton Independent School District, 234 S. W. 1090 (Tex. Comm., 1921); Dunbar v. Brazoria County, 224 S. W. 2d 738 (Tex. Civ. App., Galveston, 1949, writ ref'd.); Knox v. Johnson, 141 S. W. 2d 698 (Tex. Civ. App., Austin, 1940, writ ref'd.); Boyett v. Calvert, 467 S. W. 2d 205 (Tex. Civ. App., Austin, 1971, writ ref'd., n. r. e.), appeal dis'm., 405 U. S. 1035 (1972); Keel v. Railroad Commission of Texas, 107 S. W. 2d 439 (Tex. Civ. App., Austin, 1937, writ ref'd.); Board of Education of Bayonne v. Bidgood, 168A.162 (N. J. 1933); Begnich v. Jefferson, 441 P. 2d 27 (Alaska, 1968); Attorney General Opinion V-371 (1947).

Your seventh question asks:

"Subsection (1) of Section 4 prohibits certain persons from using certain information 'in an unofficial manner' Is this term specific enough for the purposes of this bill, and if so, what is its meaning?"

Subsection (1) of § 4 is:

"No person occupying a public office or civil position of trust under the State shall voluntarily and intentionally use information gained solely by reason of his official position in an unofficial manner or in a manner not authorized in his official position for the private economic of himself or the private economic gain of another person. "

Since there are no criminal penalties attached to a violation of the acts prohibited by § 4, constitutional problems involving sufficiency of the definition do not arise. For the purposes of the Act itself, we would believe the language to be sufficiently definite.

Your eighth question is:

"In the light of the sanctions provided in the substitute (See Section 7), what would be the sanction, if any, for a violation of Section 4 which defines prohibited acts?"

The only sanction provided for by the Bill with reference to one of the "prohibited acts" of § 4 are the sanctions contained in § 7 which, with reference to § 4 provides:

"(1) If any person fails to comply with any provision of this Act, the Attorney General may, at the request of the Secretary of State, initiate and maintain a civil action in an appropriate district court for an order of the court requiring such person to comply with any such provision or regulation with respect to which compliance is sought. Failure to comply with such court order within a reasonable period of time not to exceed fifteen days shall be punishable by a fine of not more than \$5,000 or imprisonment in the county jail for not more than two years, or both."

This is a contempt provision and would require entry of a court order compelling compliance before any sanctions would be imposed. Thus, for instance, for a violation of subsection 1 of § 4 having to do with the misuse of information, the court would be requested to issue an order requiring that such misuse stop. If it did stop in compliance with the order, there would be no sanction imposed. If it did not, then the offender would be subject to the sanction of the Act.

Your ninth question asks:

"Section 7 provides for a civil action to compel compliance with any provision of the act. Would this section actually apply to any violation other than failure to file a disclosure statement?"

It is our opinion that it would apply to any provision of the Act.

Your tenth question asks:

"Section 7, subsection (1) provides that failure to comply with the court order 'within a reasonable period time not to exceed fifteen days shall be punishable by' a specified fine, jail sentence, or both. Is this merely a statement of the penalty for contempt of court, or does the provision define a criminal offense of the misdemeanor class?"

It is our opinion that this does not define a crime of any class. It defines contempt for failing to comply with an order of the court and will be applicable only if there is an order of the court which has been disobeyed.

Your paragraph 11 asks:

"Section 2 of the substitute requires the financial disclosure statements to be sworn, but Section 7 subsection (2) provides a misdemeanor penalty for a person who 'knowingly and wilfully falsifies all or part of any financial disclosure statement . . .' Does this mean that a person who wilfully files a false statement under oath would not be subject to prosecution for the felony offense of perjury or false swearing?"

Perjury is defined by Article 302, Vernons' Texas Penal Code as follows:

"Perjury is a false statement, either written or verbal, deliberately and wilfully made, related to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or is necessary for the ends of public justice, or is necessary for the conduct of any official hearing, inquiry, meeting or investigation by any legislative committee or other instrumentality of government having legal authority to issue process for the attendance of witnesses, whether or not such process was in fact issued."

It is further defined by Article 306.

False swearing is defined in Article 310 of the Penal Code as:

"If any person shall deliberately and wilfully, under oath or affirmation legally administered, make a false statement by voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing and shall be punished by confinement in the penitentiary not less than two nor more than five years."

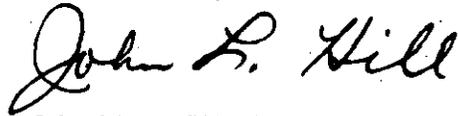
Of interest is the fact that § 24 of Article 4 of the Constitution of Texas which provides that all offices of the Executive Department and all officers and managers of State institutions shall keep records of moneys, etc., received and disbursed and which authorizes the Governor to require reports, under oath, goes on to provide:

". . . and any officer or manager who, at any time, shall wilfully make a false report or give false information, shall be guilty of perjury, and so adjudged, and punished accordingly, and removed from office."

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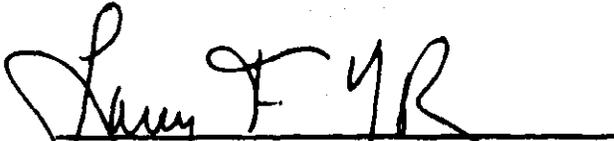
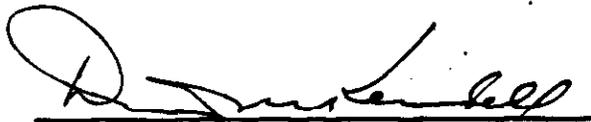
We believe there is a direct conflict between the provisions of subsection 2 of § 7 and the constitutional and Penal Code provisions against perjury. It is our opinion that the Constitution will prevail and that a person who wilfully files a false statement under oath, will be subject to punishment for perjury.

Very truly yours,



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APPROVED:


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