THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

May 21, 1957

Honorable Wardlow Lane, Chairman
State Affairs Committee
Texas Senate
Austin, Texas

Opinion No. WW-140

RE: Constitutionality of House Bill No. 239

Dear Senator Lane:

Your letter dated May 7, 1957, and received in this office on May 10th, requests an opinion as to the constitutionality of House Bill No. 239 now pending before the State Affairs Committee of the Senate.

The caption of said Bill recites a purpose "to promote interracial harmony and tranquility and to that end to declare it to be the public policy of the State that the right of all people to be secure from interracial tension and unrest is vital to the health, safety and welfare of the State". Section 1 of the Bill recites that it is "the duty of the government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils and violence which would result from interracial tension and unrest and possible violations of the laws of Texas".

Section 2 of the Act requires registration with the Secretary of State of "every person, firm, partnership, corporation or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates who or which":

1. Engages as one of its principal functions or activities the advocating of racial intergration or segregation, or

2. Whose activities opposing or favoring segregation of races cause or tend to cause racial conflicts or violence, or

3. Who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of racial integration color; (Emphasis added).

Section 2 further provides:

> ". . . that nothing herein shall apply to the right of the people peaceably to assemble and to petition the government for a redress of grievances, or to an individual freely speaking or publishing on his own behalf in the expression of his opinion and engaging in no other activity subject to the provisions hereof and notacting in concert with other persons."

Section 3 sets out in detail the information that shall be supplied with such registration.

Section 4 makes the registration records on file in the Secretary of State's Office open to public inspection.

Section 5 prescribes penalties for violation of the Act.

Section 9 of the Act provides:

> "Sec. 9. This Act shall not apply to persons, firms, partnerships, corporations or associations who or which carry on such activity or business solely through the medium of newspapers, periodicals, magazines or other like means which are or may be admitted under United States postal regulations as second-class mail matter in the United States mails as defined in Title 39, 224, United States Code Annotated, and/or through radio, television or facsimile broadcast or wire service operations. This Act shall also not apply to any person, firm, partnership, corporation, association, organization or candidate in any political election campaign, or to any committee, association, organization or group of persons acting together because of activities connected with any political campaign."

Although the Bill in question has been popularly referred to as a so-called "segregation" measure, it is noted that its provisions, generally, apply alike to those advocating either "racial segregation" or racial integration".

We think it clear, despite the presence in both Sections 2 and 9 of provisions limiting the effects of the Bill upon freedom of speech and freedom of press, that the Bill in question places certain restrictions and burdens upon the exercise of these two basic freedoms as guaranteed by both the State and Federal Constitutions.

The primary question before us is whether the Bill may be upheld as a legitimate exercise of the police power of the State. It is well established in both our State and Federal law that the constitutional guarantees of freedom of speech and of the press do not deprive the State of its right to enact laws in the ligitimate exercise of the police powers, and pursuant to such power, reasonable regulations of speech and press may be adopted in order to promote the general welfare, public health, public safety and order, or morals. 16 C.J.S. 1111, Sec. 213(7). The question with which we are here concerned is not whether the Legislature has such power, but whether the means which it has employed conflict with either the State or Federal Constitutions. Dennis v United States, 1951, 341 U.S. 494.

The general rule with reference to the authority of the State to restrict freedom of speech and of press, has been stated as follows:

> "The power of the State to abridge freedom of speech and of the press is the exception rather than the rule, and the Legislature may not, under the guise of the police power, arbitrarily or unnecessarily interfere with the freedom of speech and of the press, nor may the Legislature prevent the fair use of the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes may be effected through lawful means. A State may not suppress free communication of views, religious or other, under the guise of conserving desirable conditions. . . . The fundamental right to speak cannot be abridged because other persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if rights are exercised. Speakers may not be prohibited from speaking because they may say something which will lead to disorder." 16 C.J.S. 1114, Sec. 213(7) and cases there cited.

The case of Ex Parte Meckel, (Crim. App., 1919) 220 S.W. 81, concerned the constitutional validity of a so-called "Disloyalty Statute" enacted by the Texas Legislature during World War I. Transposing the phrases of the Act, the court stated that the pertinent provisions thereof would read:

> "If any person in time of war, in the presence and hearing of another person . . . use any

> language . . . which language . . . is of such nature as that in case it is said in the presence and hearing of a citizen of the United States, it is reasonably calculated to provoke a breach of the peace, such person shall be guilty of a felony, etc. . . ."

In declaring the foregoing provisions of the Act as being violative of the Bill of Rights the court said:

> "It seems too clear for discussion further, that the gravamen of the offense thus created is the use of language of such nature as that in case it is uttered in the presence of a citizen of our country it would likely cause a breach of the peace, and that the terms of said section are so framed as to penalize one who utters language of such nature, whether or not same be used under circumstances or in such presence as to make same reasonably provocative of a breach of the peace."

In light of the foregoing authorities, and particularly in light of the case last above cited by the Texas Court of Criminal Appeals, let us examine the provisions of Section 2 of House Bill No. 239. Said section requires the registration of designated persons, groups, etc., in any of three stated contingencies as follows:

1. If the advocacy of racial integration or segregation constitutes a principal function or activity; or

2. If such activities cause or tend to cause racial conflicts or violence; or

3. If such persons, firms, etc., are engaged, or engages, in raising or expending funds for employment of counsel or payment of costs in connection with litigation in behalf of racial integration color.

It is readily apparent that the first two contingencies, requiring registration are not limited to such advocacy or activities as are reasonably calculated to provoke a breach of the peace but apply to advocacy which was merely a principal function or activity and such activities as caused or tended to cause racial conflicts or violence. The Bill as so written is not limited to such advocacy or activities which are reasonably calculated to create the alleged evils which the Bill seeks to correct or prevent and hence, it cannot be supported under the police powers of the State. It is not necessary for

us to decide whether the provision could be so revised as to render same constitutional in all its provisions. American Federation of Labor v. Mann, 188 S.W. 2d 276.

The provision of Section 2, which provides that those "who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of racial integration color" poses a somewhat different question. The courts have displayed a more lenient attitude toward those statutes which require registration by persons, firms or organizations who or which undertake the public collection of funds or securing subscriptions. Reasonable registration or identification in such cases is generally permitted. Communist Party of U.S. v. Subversive Act. Con. Bd., 223 F. 2d 531; Thomas v. Collins, 323 U.S. 516. Apart from the vagueness and uncertainty of the language used in said provision, it is our view that same could not be sustained upon the basis of being a reasonable requirement inasmuch as it applies with equal effect to funds expended as well as funds collected. Hence, it would restrict individuals and others named in the expenditure of purely personal or private funds for a lawful purpose. As to whether the provision is reasonable and can be sustained in other respects we do not here decide.

In the interest of brevity we do not undertake a discussion of other legal questions which arise in connection with the Bill.

You are, therefore, advised that in our opinion, House Bill No. 239, for reasons stated, violates both our State and Federal Constitutions and hence is unconstitutional.

SUMMARY

House Bill 239, violates freedom of speech and freedom of press as guaranteed by both our State and Federal Constitutions and hence is unconstitutional.

Yours very truly,

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